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IN THE

Supreme Court of the United States

October Term 1972

NO. 72-649

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT, ET AL, *Petitioners,*

v.

JOSE CISNEROS, ET AL, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Corpus Christi Independent School District, its Board of Trustees and superintendent, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on August 2, 1972.

OPINIONS BELOW AND IN THIS COURT

The following, listed in chronological order, are the pertinent opinions and orders of the trial court, the Court of Appeals, and this Court:*

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* Pursuant to the provisions of Supreme Court Rule 23(i) the Appendix is filed separately because of its volume.

(1) The District Court's first Memorandum Opinion finding a constitutional violation, reported at 324 F.Supp. 599 (Appendix, p. 1);

(2) The District Court's Partial Final Judgment dated June 4, 1970, granting injunctive relief, ordering the filing of a "desegregation" plan, and authorizing an interlocutory appeal (Appendix, p. 49);

(3) Order of the Court of Appeals for the Fifth Circuit denying leave to appeal from the trial court's interlocutory order, not contained in the official reports (Appendix, p. 53);

(4) The District Court's second Memorandum Opinion prescribing student reassignment, dated July 2, 1971 and reported at 330 F.Supp. 1377 (Appendix, p. 54);

(5) The District Court's Final Judgment, dated July 2, 1971 (Appendix, p. 98);

(6) Opinion Order of Mr. Justice Black reinstating stay pending appeal, dated August 19, 1971 and reported at 404 U.S. 1211, 92 S.Ct. 9, 30 L.Ed.2d 15 (Appendix, p. 104);

(7) Opinion Order of the Court of Appeals for the Fifth Circuit denying Petition for En Banc Hearing, dated October 7, 1971 and reported at 448 F.2d 1392 (Appendix, p. 106);

(8) En Banc opinion of the Court of Appeals for the Fifth Circuit on the merits, dated August 2, 1972 and not yet reported in the official reporter system (Appendix, p. 119);

(9) Letter-Mandate of the Clerk of the Court of Appeals for the Fifth Circuit dated August 2, 1972 (Appendix, p. 155).

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was rendered on August 2, 1972 (Appendix, p. 119) and the mandate was issued on the same date (Appendix, p. 155): consequently no motion for rehearing was filed.

This Court has jurisdiction to review the opinion rendered below pursuant to the provisions of Title 28 U.S.C. Sec. 1254.

QUESTIONS PRESENTED

1. Whether a school district which has historically assigned white children to neighborhood schools based solely on geographic attendance zones, resulting in the joint attendance by Mexican-American and Anglo-American* children at 57 of the district's 60 schools, has a constitutional duty to eliminate unintended ethnic concentrations in some of the schools which result from residential and demographic patterns not effected by state action.

2. Whether a school district has a constitutional duty to abandon the neighborhood school concept when housing patterns, demographic fluctuations, and economic conditions, none of which are caused by state action, result in concentrations of children of one national ancestry or another at some schools within the district.

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* All parties agree that children of Mexican-American ancestry are classified as white. Throughout the trial below and in this petition children of Mexican-American ancestry are referred to as "Mexican-Americans"; all other white children are referred to as "Anglo-Americans."

3. Whether the trial court and Court of Appeals were correct in applying the affirmative-duty standards prescribed for disestablishing admittedly de jure segregated black-white school systems in determining whether Mexican-Americans were being denied equal protection rights in the Corpus Christi schools.

4. Whether a school district, when confronted for the first time with the contention and judicial determination that groups of children of different national ancestries (or different social or economic backgrounds) have become concentrated in particular schools to a constitutionally impermissible degree, must eliminate the concentrations instanter rather than over a reasonable period of time.

5. Whether, when only certain schools within a district are ethnically imbalanced, the district should be required to adopt a system-wide reassignment plan rather than a remedy confined to the particular school or schools involved, on the basis of specific findings of fact with respect to each school involved.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. U.S.C., Constitution, Amendment 14, Section 1:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

General Statement

For many years the Corpus Christi Independent School District has assigned each white child in the District to the school closest to his home—his neighborhood school. This case arises out of claims by white students of Mexican-American ancestry that they are members of a separate class whose constitutional rights have been violated by this method of student assignment. Jurisdiction in the District Court was based on Title 28 U.S.C. §§ 1331 and 1343 and on Title 42 U.S.C. §§ 1981, 1983, 1988, 2000c-8 and 2000d.

Although the original complaint alleged claims on behalf of the District's black children, those matters are not brought forward by this petition. Enough has been written about the affirmative duty of a pre-1954 de jure segregated system to dismantle its black and white schools. Black and white children already attend four of this District's five high schools, eight of its twelve junior high schools, and twenty-three of its forty-three elementary schools. Whatever else may be required will be accomplished.

The issue presented here is the validity of the Court of Appeals' determination that the numerical imbalance between Mexican-American and Anglo children in some of the District's schools is neither de facto nor de jure, but simply "unconstitutional."

Factual Background

Citizens of Mexican-American ancestry comprise a large part of the population of the Corpus Christi Independent

School District. During the school year 1969-1970, 47.19% of the 46,000 children attending school were Mexican-Americans. It has been stipulated and the facts reflect that the only classification accorded these children by the District was the designation "white". (R. Vol. XX, Doc. 28, p. 6)*

For as long as existing records reflect, the School District has constructed schools and assigned white children to them pursuant to a neighborhood school plan. According to the current superintendent, school records dating back to 1938 reflect adherence to this educational concept. (R. Vol. IV, p. 713) The policy has obviously been followed since at least 1928 when there was only one high school for all of the white children in the District. (Pl. Ex. 36) When it was first adopted is not known.

Neither the State of Texas nor the Corpus Christi Independent School District has ever adopted or pursued a policy of maintaining separate schools for component elements of the white race, based on national ancestry or ethnic, social, or economic criteria. The School District has never precluded a white child from attending his neighborhood school because of national ancestry or for any other reason. (R. Stipulations in Pre-Trial Order, Vol. XX, Doc. 28)

Until it was required to do so by the Department of Health, Education and Welfare during the year 1967, the School District maintained no separate records classifying Mexican-American children as such. (R. Vol. V, p. 730) As a consequence, when confronted with the present litigation it had no statistical records pertinent to Mexican-

* Such references in this petition are to the Record, including Volume numbers, Document number if applicable, and page.

American or Anglo-American children alone. The pre-1967 figures hereafter cited were formulated on the basis of a less-than reliable Spanish-surname analysis of old attendance records. A Spanish-surname analysis is "less-than-reliable" because in 1969 alone the County Clerk of Nueces County, Texas in which the Corpus Christi Independent School District is located, issued 173 marriage licenses to Mexican-American-Anglo-American couples (based again on surname analysis). (R. Vol. XVI, p. 425)

Since the school assignment at the heart of this controversy is based on geography, geographic data pertinent to the District is relevant. The Corpus Christi Independent School District is roughly co-extensive with the metropolitan area of the City of Corpus Christi, Texas. It is crescent-shaped and bounded by water on the north, the east, and the south. From its original location in its now-northeast corner, the city has expanded rapidly along the water constituting its easterly boundary, and at a more leisurely pace in a westerly direction. Its east-west width now varies from three to four miles, and generally speaking it can expand farther only in a westerly direction from its eleven mile long northwest-southeast axis.

The population of the city (and of the District) has increased at a rapid rate: 28,000 in 1930, 108,000 in 1950, 168,000 in 1960, and 214,000 in 1970. (R. Vol. V, p. 713) The increase in population has necessitated a corresponding rate of school construction. In 1954 there were 39 schools in the District, three of which were exclusively for Negro children. The remaining 36 schools were jointly attended by white children of which 13,668 were Anglo and 11,883 were Mexican-American (determined on the basis of surname). (Def. Ex. 7)

By the school year 1969-1970, when this case was tried, a few old schools had been abandoned but many more had been constructed, raising the total in the District to 60; Mexican-American and Anglo children jointly attended each of the five high schools, each of the twelve junior high schools, and 40 of the 43 elementary schools. (Def. Ex. 4, Appendix, pp. 18-19)

The record is as devoid of evidence of discrimination against Mexican-Americans in the community as it is of discrimination in the schools. Jose Cisneros, the only class representative called as a witness, testified that he had never been refused service in a store, he was never required to sit in a designated area on any public transportation facility, he had never been refused admission to any theater or other public place, he had never been required to use separate facilities in any hotel or motel, and he had never been required to use separate restroom facilities or drinking fountains; he did recall having been refused service at a small restaurant in 1949. (R. Vol. VIII, pp. 1409-1411)

With respect to residential patterns, census tracts (Pl. Ex. 4d), city directories (Def. Ex. 23), locator maps (Def. Ex. 22), and ethnic distribution maps (Def. Exs. 302a, b and c) established that Mexican-Americans and Anglos jointly reside in all residential areas of the city in varying proportions. Nevertheless, some areas are more densely populated by Anglos and others by Mexican-Americans. These concentrations did not result from state action. Although a limited number of [redacted] deeds containing restrictive covenants were offered in evidence (Pl. Ex. 25), the restrictions have never been enforced. To the contrary, the evidence established that in fact the very

areas to which the deeds related were among those most densely populated by Mexican-Americans. (Pl. Ex. 35, Def. Exs. 302a, b and c)

Mr. Cisneros testified that although he lived in an area heavily populated by Mexican-American citizens, there were other homes in predominantly Anglo-American neighborhoods which he could afford, to which he could move if he so elected, and that the location of his residence was a pure matter of personal choice. (R. Vol. II, pp. 406-407; Vol. VIII, p. 1408)

It was established that the neighborhood school plan is based on sound educational concepts rather than mere administrative convenience. (R. Vol. VII, pp. 1126-1129; Vol. VIII, pp. 1215-1230) While subscription by the District to this plan produced mixtures of Mexican-Americans and Anglos in some schools disproportionate to their district-wide ratios, the condition was neither intentional nor static. School boundaries were drawn and new schools constructed on the basis of long-range estimates of needs, without differentiation between Mexican-American and Anglo-American residential patterns or concentrations. R. Vol. V, pp. 734-735; Vol. VI, pp. 965-983) Movement of the populace and the increasing rate of growth of the city interacted with the neighborhood plan to produce changing proportions of Mexican-American and Anglo-American children in the individual schools. In schools located in densely populated Mexican-American residential areas of the city such as Moody High School, Barnes and Cunningham Junior High Schools, and Prescott and Travis elementary schools, the 1969-1970 Mexican-American enrollment was from 85 to 95% of the total student body. (Def. Ex. 4, Appendix, pp. 18-19)

In areas where there was a greater residential mixing of Mexican-American and Anglo-American residents, there was a similar mixing in the schools with the percentage of Mexican-American children ranging from 23% at Ray High School to 44% at Driscoll Junior High School to 35% and 47% respectively at Carroll Lane and Houston Elementary schools. (Def. Ex. 4; Appendix, pp. 18-19) Likewise, heavy concentrations of Anglo-Americans in some of the neighborhoods were reflected in the schools serving those areas, for example, King High School, with 90% Anglo-American attendance, Haas Junior High School with 88% Anglo-American attendance, and Montclair elementary school with 94% Anglo-American attendance. (Def. Ex. 4, Appendix, pp. 18-19)

Significant changes in ethnic ratios have come about in many of the schools since 1954, not because of boundary alterations but simply because of movement of people throughout the community:

	Percentage of Mexican-Americans			Percentage of Anglo-Americans		
School	in 1954	in 1969	in 1971	in 1954	in 1969	in 1971
Ray High	13.36	23.61	36.34	86.64	76.06	62.80
Baker Jr. High	2.80	24.30	32.19	97.20	75.35	66.77
Carroll Lane	1.41	23.21	30.50	98.59	76.61	69.30
Central Park	1.49	32.09	34.99	98.51	67.24	64.88
Crossley	52.98	18.76	27.65	47.02	.86	1.29
Fannin	8.97	63.71	73.97	91.03	35.89	25.39
Furman	33.98	88.93	88.69	66.02	9.88	9.01
Houston	1.30	47.81	54.56	98.70	51.90	45.44
Lexington	7.78	56.26	64.85	92.22	43.33	35.15
Menger	1.07	34.78	40.86	98.93	64.07	58.32
Oak Park	10.64	54.19	55.13	89.36	35.40	25.87
Prescott	65.83	95.33	96.95	34.17	3.17	0.68
Savage	3.91	43.06	41.95	96.09	56.94	57.75
Travis	15.19	90.74	91.01	84.81	9.16	8.75

(Taken from Def. Exs. 4, 7 and 303).

Consistent with its adherence to the neighborhood school philosophy the District has not engaged in transportation of its students. Although its 1969-1970 enrollment was 46,017 it operated only nine school buses, four of which were for regular students who resided in rural areas and five of which were for transportation of physically handicapped children. (R. Vol. VII, pp. 1068-1069)

In 1969 no school in the District had a teaching staff of more than 50% Mexican-American and only two schools had a combined Negro-Mexican-American staff exceeding 50%. Each of the District's 60 schools had both Anglo-American and Mexican-American teachers and Negroes were teaching in 40 of the schools. (Def. Ex. 4, Appendix, pp. 18-19) From 1955 to 1969 the number of Mexican-American teachers on the staff increased approximately 600% from 56 to 330. (Def. Ex. 9). Almost half of the teachers employed during this fourteen year period were Mexican-American. (Def. Ex. 9)

There was no evidence that any existing school boundary or any past school boundary had been established, relocated, or gerrymandered for the purpose of segregating Mexican-American and Anglo-American children. The testimony of members of the School Board that boundaries had never been altered for the purpose of achieving a given ethnic result went unassailed. (R. Vol. VII, pp. 782-783, 824-825)

The same was true with respect to construction of new schools. School sites were selected and purchased up to ten years in advance based on a multitude of considerations related to the growth of the community and educational needs. The principal objective was the construction of schools to meet the population requirements of existing

or anticipated residential areas. (R. Vol. V, pp. 734-735; Vol. VI, pp. 965-966; 983) Race and national ancestry played no part in site selection.

In short, the record here does not reflect ethnic imbalance as a result of discrimination against Mexican-Americans and neither the trial court nor the Court of Appeals so found. On the contrary, if there is a constitutional infringement it must be found in the fact that the School Board did *not* treat Mexican-American children differently from other white children.

Course of the Litigation

This suit was filed on July 22, 1968. Excluding issues as to Negro children not here presented, the complaint alleged discriminatory segregation of Mexican-American students in certain particulars, and the prayer for relief was tailored to the discrimination claimed. No district-wide integration of Mexican-American and Anglo children was sought. The prayer was expanded, however, in a pre-trial order dated May 14, 1970, to include a contention that the School District should accomplish a complete integration of Mexican-American and Anglo children. (R. Vol. XX, Doc. 28)

The case was disposed of by the trial court in two separate trials. The first terminated in a "partial final judgment" and memorandum opinion dated June 4, 1970. In the opinion the court reached the contradictory conclusions that *"some"* of the segregation of Mexican-Americans was of a de facto nature "because of the socio-economic factors . . . and . . . the pattern of the geographic and demographic expansion of the city toward the south and southwest" (Appendix, pp. 29-30), and that regardless of the good intentions of the School District it did in

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fact "maintain and promote a dual school system" which was *"wholly* so with respect to the District's Mexican-Americans."* (Appendix, p. 36, text and fn. 58) He found as the genesis of this "segregation" not an intent to discriminate but the failure of the School District "to anticipate and correct the imbalance that was developing". (Appendix, p. 31)

The District was thereupon enjoined from doing that which it had never done before—the assignment of students, teachers, and staff on the basis of ethnic origin. It was ordered to immediately reassign teachers and staff, to achieve "a reasonable mixture" of Mexican-American students with other students in each new or expanded school, and to file a student reassignment plan which would "conform to law" and be put into effect in the fall of 1970. (Appendix, p. 50) The court declared the holding that Mexican-Americans were entitled to relief because they had been subjected to both de jure and de facto segregation to involve a controlling question of law as to which there was "substantial ground for difference". He suggested an immediate interlocutory appeal but declined in advance to stay any portion of his judgment during the pendency thereof. (Appendix, pp. 51-52)

The School District petitioned the Court of Appeals for the Fifth Circuit for leave to file an interlocutory appeal. The petition was denied on July 10, 1970, without opinion. (Appendix, p. 53)

The District Court then conducted a second trial in August, 1970, for the purpose of considering various proposals for student reassignment which would achieve a

* Emphasis throughout the petition is that of petitioner unless otherwise indicated.

greater intermixing of Mexican-American and Anglo-American children. Following this trial the United States Department of Justice was invited by the court to intervene and to suggest a student reassignment plan, which it did.

On July 2, 1971, a final judgment and memorandum opinion were entered directing implementation of the trial court's own plan which called for a massive reassignment of children. The plan would have required the previously non-busing District to transport 15,000 students. (Appendix, p. 92) It was estimated that this could be accomplished through an initial outlay of $1.7 million, to include the purchase and operation of ninety-six 72-passenger buses if each bus carried 12 additional students standing and made two round trips each morning and afternoon. (Appendix, p. 92)

Had there been any doubt before that the trial court's first memorandum opinion and "partial final judgment" were based on a belief that the Constitution affirmatively required integration regardless that there had been no discrimination, all doubt was removed by his prefatory remarks to his plan for student reassignment:

> ". . . Where races, religious, or ethnic groups *become* segregated, this breaks down the concern which individuals should have for the well-being of the whole community and for each of its members. It is this breakdown and the constitutional guarantee of equal protection which creates the duty to act affirmatively to bring about integration of public facilities and precludes reliance on the neighborhood school concept *where the housing patterns operate to exclude significant numbers of students of any ethnic group from schools within the District.*" (Appendix, p. 76)

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The trial court concluded the second memorandum opinion and final judgment with the same anticipatory announcement that no stay would be granted pending appeal. (Appendix, pp. 97, 102) Because of the novelty of the court's holding and the practical impossibility of equipping itself with transportation facilities to carry out the reassignment plan by the commencement of school in the fall of 1971, the School District nonetheless petitioned the district court for a stay. The trial judge who had originally heard the case was out of the country and a second judge was assigned to hear the stay application. He granted a stay of so much of the reassignment plan as related to "integration" of Mexican-American and Anglo-American children. The stay was vacated by the Court of Appeals for the Fifth Circuit, without opinion, on August 5, 1971. It was reinstated by Mr. Justice Black on August 19, 1971. (Appendix, p. 104)

The School District's request for an en banc hearing of the appeal on the merits was denied with a dissenting opinion. (Appendix, p. 106) The case was argued before a three-judge panel, following which it was announced to the litigants by letter from the court (Appendix, p. 117) that an opinion in the case would be withheld pending a decision by this Court, presumably *Keyes v. School District No. 1, Denver, Colorado,* cert. granted ____U.S.____, 92 S.Ct. 707.

For reasons never explained, the Court of Appeals subsequently reversed its course in two respects: it determined on its own motion to render an en banc opinion and it did so without awaiting the *Keyes* decision. (R. Vol. XXIII, Doc. 32) The merits opinion was delivered on August 2, 1972. (Appendix, p. 119) It recites an eight to seven split among the judges on whether to await the

decision in *Keyes*. (Appendix, p. 154) It reflects further disagreement among the court, first as to whether a constitutional transgression had been demonstrated and second, as to whether the trial court's remedy was proper.

As to the first question presented, a majority of the divided court held that the existing numerical imbalance between Mexican-Americans and Anglos in the District's schools was "not de facto, not de jure, but unconstitutional". (Appendix, p. 130) It found a relationship "in terms of cause and effect" between this imbalance and the District's utilization of the neighborhood school plan, and held that such imbalance was therefore not tolerable, regardless that the District had been neutral in its application of the plan (Appendix, pp. 131-132), regardless that there had been no distinction made in the treatment of Mexican-Americans and Anglos (Appendix, pp. 131-132), regardless of lack of discriminatory intent (Appendix, pp. 132-133), and regardless of the absence of state action influencing residential patterns. (Appendix, p. 131)

Although the majority apparently concluded that a district-wide reasignment of students was in order, it disapproved the remedy prescribed by the trial court and remanded the case for the formulation of a new student assignment plan pursuant to a series of general guidelines. (Appendix, pp. 137-140)

The trial court characterized the facts of this case as presenting issues as to which there are "substantial grounds for difference". (Appendix, p. 52) The Court of Appeals termed the case "novel". (Appendix, p. 120) Mr. Justice Black said the case raises "questions not heretofore passed on by the full Court, but which should be." (Appendix, p. 105)

Because of the extreme importance to the Corpus Christi Independent School District of a correct resolution of the questions presented and the far-reaching effect of their determination on other school districts throughout the nation, the School District timely files this petition for review.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the decisions of this Court and of other Courts of Appeals on the same matter in the following respects:

(a) It has held that children of different national ancestries have a substantive constitutional right to a particular (but unspecified) degree of mixing.

(b) It has held that ethnic imbalance in some of a system's schools presumptively results in a denial of equal educational opportunity, even though the imbalance is not caused by a discriminatory method of student assignment.

(c) It has held that there is no valid constitutional distinction between de jure and de factor segregation—that no matter how neutral or non-discriminatory a school board has been and regardless that state action has not influenced residential patterns, the school board may not employ a neighborhood school plan based on geographic attendance zones if the result in fact is ethnic imbalance in some of its schools.

(d) It has held that the constitutionality of ethnic imbalance in a school system in which de jure seg-

regation has never existed is nevertheless dependent on whether the school district has taken the various affirmative steps prescribed for disestablishing admittedly de jure segregated school systems.

2. The Court of Appeals for the Fifth Circuit has decided important questions of federal law which have not been but should be, settled by this Court:

(a) It has declared that all ethnic imbalance in the schools results in unequal educational opportunities and must be eliminated.

(b) It has determined that as new fact situations are presented to the federal courts in which Fourteenth Amendment violations are claimed, the remedy in each such case should be the same as has been developed and applied in the disestablishment of de jure segregated school systems in the South, both in terms of time limitations and scope.

ARGUMENT

I. From a Fourteenth Amendment Point of View Ethnic Imbalance in Some of a System's Schools Does Not Give Rise to a Presumption of Unequal Educational Opportunity Unless it Results from Discrimination on the Basis of National Ancestry.

Ostensibly in reliance on *Brown I (Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 373 (1954)) the Fifth Circuit has here concluded that one of the two factual determinations prerequisite to a finding of "unlawful segregation" is:

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> ". . . a denial of equal educational opportunity . . . defined as racial or ethnic segregation." (Appendix, p. 124)

Out of context, this may appear to be a correct summary of the holding of *Brown I*. A closer examination of the opinion below discloses, however, that the term "segregation" was employed in a completely different sense from the meaning accorded it by this Court. The "segregation" which *Brown I* held equivalent to a denial of equal educational opportunity was delineated thus:

> ". . . The plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." (347 U.S. at 495; 74 S.Ct. at 692)

The "segregation complained of" was that:

> "In each instance (Negroes) have been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. . . ." (347 U.S. at 487-488; 74 S.Ct. at 688)

The Court then clearly phrased the issue:

> "We come to the question presented: Does segregation of children in public schools *solely on the basis of race*, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does." (347 U.S. at 493; 74 S.Ct. at 691)

To make it even more clear that it was only segregation on the basis of race which it was equating to a denial of

equal educational opportunities, the Court said, with respect to Negro children so segregated:

> ". . . To separate them from others of similar age and qualifications *solely because of their race* generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . ." (347 U.S. at 494, 74 S.Ct. at 691)

In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 575 (1971), this Court construed *Brown I* as holding "that state-imposed segregation by race in public schools denies equal protection of the laws" (402 U.S. at 11, 91 S.Ct. at 1274) and said that this type of "segregation" was "the evil . . . struck down." (402 U.S. at 15, 91 S.Ct. at 1275)

The Fifth Circuit enlarged the "segregation" equated by *Brown I* to denial of equal educational opportunity to include numerical imbalance between children of different national ancestries at given schools within a system regardless that the imbalance was unintentional and resulted from the neutral employment of a neighborhood school plan commencing long before *Brown I* became the law of the land. The Court was wrong. The fact of numerical imbalance between children of different national ancestries in some of petitioner's schools, resulting from assignment based on residence in the attendance area served by the school does not justify or warrant a conclusion that Mexican-American children are being denied an equal educational opportunity.

In *Brown I* this Court reasoned that separation of Negro children *solely* because of their race generates a feel-

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ing of inferiority as to their status in the community that might well affect their hearts and minds and that this sense of inferiority affects the motivation of the child to learn (347 U.S. at 494, 74 S.Ct. at 691) Nothing in the opinion suggests, however, that attendance at school in disparate ratios by children of different ethnic ancestries, based solely on geographic attendance zones and their parents' choice of residential location, likewise generates a similar feeling of inferiority which affects the motivation of the child to learn. There was no evidence in this case that such a phenomenon occurs and certainly there is no judicial precedent for such an assumption.

There is nothing denigrating in the District's method of student assignment. It has never assigned Mexican-American and Anglo-American children to separate schools on the basis of national ancestry. Assignment to schools, based on a neighborhood school plan utilized since before 1938, is dependent entirely upon residential location. No child has ever been precluded from attending his neighborhood school because of national ancestry and such a claim is not made on behalf of the plaintiffs here.

Does ethnic imbalance in the public schools resulting from such a method of student assignment require or even authorize a conclusive presumption that unequal educational opportunities exist? If it does, at what degree of imbalance does the presumption arise? This Court has stated that there is no substantive constitutional right to a particular degree of mixing. *Swann v. Charlotte-Mecklenburg Board of Education, supra; North Carolina State Board of Education v. Swann,* 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971); see *Lawlor v. Board of Education of the City of Chicago,* 458 F.2d 660 (7th Cir. 1972). The Fifth Circuit avoided the issue suggesting that

each case should be decided on an individual basis. This easy evasion may have met the exigencies of the court at the moment, but what a discomforting state of the law for the many school systems throughout the nation in which residential concentrations of Chinese, Cubans, Puerto Ricans, Italians, etc., are reflected in the neighborhood schools.

What lies ahead for the Corpus Christi Independent School District which has been told by the Supreme Court that there is no constitutional right to a particular degree of mixing and by the Fifth Circuit that the degree of imbalance here is neither de facto nor de jure, but simply unconstitutional—that it must do better without specification of precisely what? What ratio is constitutional? How much mixing is enough? When should a district abandon the neighborhood school plan in favor of a method of assignment based solely on race or national ancestry or economic or social differences between groups of its residents? The Fifth Circuit does not suggest.

A requirement of school-by-school balance between students from varying ethnic backgrounds in the community will insure the involvement of schools and federal courts in ethnic-balance litigation for scores of years to come. If this Court does not agree that an undefined and unintentional degree of ethnic imbalance results inevitably in unequal educational opportunity derogative of Fourteenth Amendment rights, the judgments of the courts below must be reversed. There were neither findings nor quantitive nor qualitative evidence offered establishing that ethnic imbalance in fact results in unequal educational opportunities or that in fact Mexican-American children were being offered an inferior education.

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It may well be that absent discrimination on the basis of national ancestry, a Fourteenth Amendment denial of equal educational opportunity exists when, regardless of race or national ancestry, a school system is intentionally affording inferior educational opportunities at some of its schools. See e.g., *Deal v. Cincinnati Board of Education,* 369 F.2d 55, 65 (6th Cir. 1966) cert. denied 389 U.S. 847, 88 S.Ct. 39; *Keyes v. School District No. 1, Denver, Colorado,* 445 F.2d 990, 1003 (10th Cir. 1971) cert. granted ____U.S.____, 92 S.Ct. 707. That, however, was not the basis upon which this case was tried.

Since the Fifth Circuit mistakenly entertained the view that all ethnic imbalance in the public schools, regardless of the manner in which it comes about, results ipso facto in unequal educational opportunities, the requested writ of certiorari should issue.

II. What Test is to be Employed in Determining Whether Ethnic Imbalance at Some of a District's Schools Violates the Equal Protection Clause?

A. The Fact of Imbalance Alone is Not Enough to Establish a Fourteenth Amendment Violation.

The Fifth Circuit has here rejected what it terms "the anodyne dichotomy of [redacted] de facto and de jure segregation", and has held that notwithstanding absence of discriminatory intent,

> ". . . the ethnic segregation that exists in the Corpus Christi school system is unconstitutional—not de facto, not de jure, but unconstitutional." (Appendix, P. 130)

There is no precedent for such a holding but much to the contrary. It presents what the First Circuit Court of Appeals termed:

> ". . . the unsettling problem which would face every school committee of anticipating what amount of imbalance the local federal court will consider equivalent to segregation. The difficulties prophesied in applying the relatively simple rule of 'one man, one vote' would seem small in comparison. Deciding what is excessive racial imbalance necessarily involves the resolution of expert appraisals of highly intangible factors." *Springfield School Committee v. Barksdale*, 348 F.2d 261, 264 (1st Cir. 1965).

In this case no expert testimony was presented and no appraisal made in the trial court of the intangible factors alluded to. No suggestion was made as to a different method of student assignment which should have been adopted at some undefined date in the past. It was simply held, inferentially, that national ancestry should always have been a basis for distinction by the School Board and school enrollments always manipulated to achieve a will-o-the-wisp ethnic balance.

Obviously ethnic imbalance produced by discriminatory treatment of Mexican-Americans offends the Fourteenth Amendment and invites intervention by a federal court. *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 373 (1954). But the Court of Appeals did not find that assignment to schools on the basis of national origin was the cause of existing imbalance. It could not have done so in light of the pre-trial stipulations (R. Vol. XX, Doc. 28) and the uncontroverted evidence that for many years white children (stipulated as including both Anglos and Mexican-Americans) have

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been and are now required to attend schools solely on the basis of geographical attendance zones set by the School Board.

Had the District discriminated against Mexican-Americans, Mexican-American and Anglo-American children would not have been in joint attendance at all of the District's 36 white schools in 1954. And the teaching staffs at each of the District's 60 schools would not have included both Mexican-American and Anglo teachers in 1969.

Since it is undisputed that national ancestry has not been the basis of student or teacher assignment and since Mexican-Americans and Anglos were in joint attendance at the various schools, it could only be the *degree* of mixing which the Fifth Circuit found unconstitutional. But in *Swann v. Charlotte-Mecklenburg Board of Education, supra,* this Court held that there is no substantive constitutional right to any particular degree of mixing. See also *North Carolina State Board of Education v. Swann, supra; Lawlor v. Board of Education of the City of Chicago, supra.* The holding below might be reconcilable, given a finding that the imbalance resulted from discriminatory treatment. But the Fifth Circuit expressly discarded discriminatory purpose as a prerequisite to a finding of "unconstitutionality." (Appendix, pp. 130; 134, fn. 7)* This holding conflicts with the decisions of a

* The Court's announcement in footnote 7 that it would forego a review of the record for evidence of discriminatory intent because it was not a required element of unconstitutionality renders its subsequent employment of the term "discrimination" more than a little confusing:

> "Where one race schools continue to exist, school authorities must show that such schools are not the result of present or past discrimination on their part." (Appendix, p. 138)

host of other Courts of Appeals which have held that imbalance in the public schools resulting from non-discriminatory Board actions and policies does not violate the Fourteenth Amendment because the Constitution does not require integration, it simply forbids segregation based on racial discrimination—that there is no Fourteenth Amendment requirement that children of different racial backgrounds attend public schools with one another. *United States v. Board of Education, Independent School District No. 1, Tulsa County, Oklahoma,* 459 F.2d 720 (10th Cir. 1972); *Lawlor v. Board of Education of the City of Chicago,* 458 F.2d 660 (7th Cir. 1972); *Deal v. Cincinnati Board of Education,* 369 F.2d 55 (6th Cir. 1966) cert. denied 389 U.S. 847, 88 S.Ct. 39; *Downs v. Board of Education of Kansas City,* 336 F.2d 988 (10th Cir. 1964) cert. denied 380 U.S. 914, 85 S.Ct. 898; *Bell v. School, City of Gary, Indiana,* 324 F.2d 209 (7th Cir. 1963) cert. denied 377 U.S. 924, 84 S.Ct. 1223; see also *Spencer v. Kugler,* 326 F.Supp. 1235 (D.C. N.J. 1971) affirmed, ____ U.S. ____, 92 S.Ct. 707.

The disparity between the holdings of the various Courts of Appeals should be resolved now by a clear pronouncement that the fact of ethnic or racial imbalance alone does not establish a denial of equal protection.

B. Whether There Is A "Cause and Effect Relationship" Between Board Action and Policies and Ethnic Imbalance Is No Test At All.

The Court of Appeals could only forge a chain between the facts as the trial court found them and the remedy he ordered by manufacturing a new link. It did so by char-

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acterizing the trial court's findings as findings that School Board action and policies had "in terms of cause and effect resulted in" (Appendix, pp. 129-130)—"in terms of actual effect, either created or maintained" (Appendix, p. 130)—a segregated school system.

The phrase "cause and effect" was used by the Fifth Circuit as meaning nothing more than "unintended result". The trial court did not find that the District "caused" ethnic imbalance intentionally. It found that the District failed to "anticipate and correct" the imbalance that was developing (Appendix, p. 31), that it failed to promote integration. Thus the Fifth Circuit was constrained to dispense with intent if it was to reach the result it did.

If the only constitutionally relevant factor is the ultimate degree of ethnic imbalance actually and unintentionally produced by actions and policies having as their intended objective sound, effective education of children then school districts must constantly revise student assignment, notwithstanding this Court's suggestion to the contrary in *Swann*. For in the sense in which the term was employed by the Fifth Circuit, there is a "substantial relationship in terms of cause and effect" between what a school board does or refrains from doing, and everything that exists or occurs in the public schools. The relationship between school board action here and whatever ethnic imbalance exists in the Corpus Christi Independent School District is no more significant than the relationship between board employment of neighborhood schools in other circuits and existing imbalance there held not to violate Fourteenth Amendment rights, i.e., *Keyes, Bell, Deal, Lawlor,* and *Spencer, supra.*

On the basis of a "cause and effect" test, constitutionality appears from the record in this case to be dependent upon the precise period in the District's history which the court chooses to analyze. Must a school district establish that it affirmatively sought ethnic balance in the past, that its past plans were directed to current ethnic balance, or that its current plans are directed to future balance? Or may it be neutral and let changes in residential patterns produce such mixtures as they will when combined with fixed, geographic attendance zones?

The record here reflects that in 1928 Miller High School was the only high school in the District and was necessarily attended by all high school students within the system. Obviously, whatever the balance or imbalance was at that time, it was constitutionally permissible. A second high school, Ray, was built in 1950 and in 1954 its enrollment was 87% Anglo and 13% Mexican-American. Whether this ratio was constitutionally permissible or impermissible is not known. By 1969 Ray was 76% Anglo and 24% Mexican-American. If it was unconstitutional in 1954, perhaps its constitutional colors had been restored. Other schools in the District reflect the same types of change. In 1955, Baker Junior High was 97% Anglo and 3% Mexican-American but by 1971 the ratio was 67% Anglo to 32% Mexican-American. Was it "unconstitutional" in 1955 and "constitutional" in 1971?

The pendulum swings both ways on the question of ratios. Prescott School, built in 1953, had a 1955 enrollment that was 35% Anglo and 65% Mexican-American. By 1971 it was 1% Anglo and 97% Mexican-American. It was never suggested and certainly the record does not reflect that any of these changes came about through

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ethnically discriminatory policies or ethnically oriented boundary changes. There are many such examples in the evidence. See the chart at p. 10, *supra.*

In the view of the Court of Appeals "the use of the neighborhood school plan was the direct and effective cause of segregation in the schools of the city." (Appendix, p. 131) Explaining its rationale, the court said the segregation resulted from "a rigid superimposition of a neighborhood school plan upon the historic pattern of marked residential segregation that existed in Corpus Christi", that "the board imposed a neighborhood school plan, *ab initio,* upon a clear and established pattern of residential segregation in the face of an obvious and inevitable result." (Appendix, p. 131) Absence of state action producing the residential patterns was held immaterial. (Appendix, p. 131) Although the rhetoric is excellent there is a deep underlying flaw—there is no evidence to support the quoted language.

The trial judge did not find that the School District had "superimposed" a neighborhood school plan upon a historic pattern of marked residential segregation, *ab initio,* in the face of an obvious and inevitable result because there was no such evidence. The record reflects only that the School District began employing the neighborhood school assignment plan at an undetermined date prior to 1938. There was no evidence as to whether the neighborhood plan had been continuously employed for Mexican-American and Anglo children since the organization of the first public schools in Corpus Christi; there was no evidence that it was adopted at some subsequent date; there was no evidence as to the ethnic makeup of the city at any point in time in the past; and there was no

evidence as to ethnic residential patterns, either at the inception of public instruction in Corpus Christi or at any subsequent date until shortly before this case was tried. Most important of all, there was no evidence as to a more "constitutional" method of student assignment than the neighborhood plan.

In 1954, the earliest year as to which ethnic information was presented, Mexican-Americans and Anglos were jointly attending every white school in the District. The neighborhood school assignment plan had already been in effect for many years. The "ab initio" circumstances are now shown by the record. In truth, the "imposed . . . ab initio" language of the Fifth Circuit is simply a paraphrase of a part of the opinion of the Tenth Circuit Court of Appeals in *United States v. Board of Education, Independent School District No. 1, Tulsa County, Okla.*, 429 F.2d 1253 (10th Cir. 1970) in which, at page 1259, that court said:

> "The attendance zones as originally formulated were superimposed upon racially defined neighborhoods and were, therefore, discriminatory from their very inception."

There is a major distinction between the two cases, however, of which the Court of Appeals did not take notice. In the *Tulsa* case neighborhood attendance zones were not utilized until the district was obligated to dismantle its previously de jure segregated schools pursuant to *Brown I*. Moreover, "the enforcement of racially restrictive covenants by the Oklahoma courts prior to 1954 and continued discriminatory housing practices constitute(d) a major cause of (the) concentrated racial isolation." 429 F.2d at 1255. These elements are missing in

the present case. The borrowed language simply does not fit the facts here—*Tulsa* was a disestablishment case. There is a vast difference between the evaluation of imbalance resulting from a long-employed neighborhood school plan and that resulting from the post-1954 adoption of such a plan to fulfill a school board's affirmative duty to dismantle a legislatively-mandated dual school system. *Deal v. Cincinnati Board of Education, supra* at pp. 62-63; *Keyes v. School Board No. 1, Denver, Colorado, supra*. . .

As stated in *Keyes*, commenting on the *Tulsa* holding with respect to neighborhood schools:

> ". . . that case dealt with a school system which had previously operated under a state law requiring segregation of races in public education. As in all disestablishment cases where a former dual system attempts to dismantle its segregated schools, the burden was on the Tulsa School Board to show that they had undertaken to accomplish a unitary public school system. Such an onerous burden does not fall on school boards who have not been proved to have acted with *segregatory intent.*" (445 F.2d 1006)

The endless ethnic manipulation required by the combination of time, demographic change, and the Fifth Circuit's improbable "cause and effect" test should not be substituted for the District's long standing policy of assigning children to the schools closest to their homes. There is no constitutional infraction in ethnic imbalance which results from such a long-continued policy where ethnic residential concentration and its reflection in the neighborhood school are the result of the parents' choice of residence.

C. The Test Is Not the Anachronistic One Employed by the Two Courts Below, i.e. Whether the District Had Met the Disestablishment Guidelines Laid Down for De Jure Segregated Southern Schools.

The Fifth Circuit concluded that the use of neutral criteria, the absence of discriminatory intent, the absence of state action affecting residential patterns, and the fact that the District had long utilized a neighborhood school plan were immaterial to a determination of the constitutionality of the ethnic imbalance in the schools. The underpinning of its rejection of these factors was its failure to distinguish the issue in this case—the existence of a constitutional violation in the first instance—from those with which it has dealt exclusively in the past—cases in which unconstitutionality was a foregone conclusion and the only inquiry was whether an admittedly de jure segregated, dual system had been disestablished.

The trial court held that the "unconstitutional system" had its "real roots in the minds of men; that is, the failure of the school system to anticipate and correct the imbalance that was developing . . ." (Appendix, p. 31) Certainly failure to anticipate and correct imbalance that is developing is a circumstance far removed from the assignment by race condemned by *Brown I.* Until it is established that ethnic separation results from school board action violative of the Fourteenth Amendment, there is no affirmative duty to promote integration. *Keyes v. School District No. 1, Denver, Colorado, supra; Deal v. Cincinnati Board of Education, supra; Spencer v. Kugler, supra.* Such an affirmative duty is imposed on school districts only *after* the determination that discriminatory action has resulted in segregation which must be eliminated root and

branch. *Green v. County School Board,* 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

Notwithstanding the clarity of these expressions the trial judge relied on disestablishment cases as setting the standard. He evaluated the Corpus Christi Independent School District not in terms of how existing ethnic imbalance came to exist but whether the School District had met an affirmative duty, the existence of which was the very subject of the lawsuit. His only findings with respect to the drawing of school boundary lines related to three schools out of a total of sixty, as to which the District was deprecated for failing to consider "promotion of integration" between Mexican-Americans and Anglo-Americans. (Appendix, p. 31, fn. 50) He found the District deficient in the location and construction of new schools and renovation of old because it did not consider "promoting integration" of Mexican-American and Anglo-American children as a factor. (Appendix, p. 32, fn. 51; p. 34, fn. 55) Although there was reference to the District's transfer system and transportation policies, only 200 of the 1800 applications received in one year were reviewed and it was admitted that the determination of inconsistency, if any, in granting or denying transfers could only be established by a review of all. (R. Vol. III, pp. 425-427; Vol. V, pp. 879-881; Vol. VII, pp. 1073-1078, 1094-1100) "Bussing of some students" (Appendix, p. 34, fn. 53) was mentioned, but the evidence was uncontroverted that the School District operated only nine buses, five of which were for handicapped children and the balance of which transported about 400 rural children to school in the city. Mexican-American and Anglo children were not separated on the buses nor were they deposited at different schools. (R. Vol. V, p. 734; Vol. VII, pp. 1068-1071)

The trial court also referred to "optional attendance zones" which he said failed to effect the required "promotion of integration" of Mexican-American and Anglo-American students. (Appendix, p. 34, fn. 54) One attendance zone was shifted first from one junior high school to a second and then to a third based entirely on school capacities as the city was growing. (R. Vol. IV, pp. 657-660; Vol. V, p. 826) A second, relating to still another junior high school, contained 103 of the District's 46,023 students, of whom twenty-five were Mexican-American and seventy-eight were Anglo. All were given the option of attending Baker Junior High School instead of the neighborhood school to relieve crowding at the latter. (R. Vol. VII, p. 1066) The last such zone involved twenty-five junior high school students who were allowed the option of attending a different junior high school because of school capacity and a safety problem created by construction of a freeway. The ethnic balances of the schools from and to which the transfers were authorized were approximately the same and the effect of the transfers was insignificant. (R. Vol. IV, pp. 660-662, Vol. VII, pp. 1066-1067)

Having already referred to new construction as a factor, the trial court somewhat over zealously referred to the "spending (of) extraordinarily large sums of money" as though the spending of money, separate and apart from the new construction for which it paid, was an additional factor; he noted again that "promotion of integration" of Mexican-Americans and Anglo-Americans was not considered by the School Board. (Appendix, p. 34, fn. 55) He likewise found that the District failed to promote integration through the assignment of Mexican-American teachers (Appendix, p. 35, fn. 56), and that the District

had failed to employ a "sufficient number" of Mexican-American school teachers. (Appendix, p. 35, fn. 57) In 1969 Mexican-Americans were teaching in every single one of the District's 60 schools. Almost half of the teachers hired by the District since 1954 were Mexican-American. There is no evidence that the District had ever failed to seek or employ qualified Mexican-American teachers or that qualified teachers of Mexican-American ancestry were available in the same numbers as Anglo teachers.

Finally, the trial court found fault with the District's failure to adopt a majority-to-minority transfer provision for Mexican-American children. (Appendix, pp. 35-36) Such a transfer policy was not even judicially required until 1969, and then only to meet the requirement of affirmative action in dismantling legislatively mandated dual systems. See *Singleton v. Jackson Municipal School District*, 419 F.2d 1211 (5th Cir. 1969) modified 396 U.S. 290, 90 S.Ct. 608.

The trial court clearly expressed his belief that a school board's duty is to equalize all of the sociological variances of the community, when he stated in his second memorandum opinion that:

> ". . . Where races, religious or ethnic groups *become* segregated, this breaks down the concern which individuals should have for the well-being of the whole community and for each of its members. It is this breakdown and the constitutional guarantee of equal protection which creates the duty to act affirmatively to bring about integration of public facilities and precludes reliance on the neighborhood school concept *where the housing patterns operate to exclude significant numbers of students of any ethnic group from schools within the district.*" (Appendix, p. 76)

Needless to say, the Court of Appeals did not conclude that the trial court had found the School District guilty of discriminatory intent or purpose to segregate Mexican-American and Anglo-American children. Although other Courts of Appeals have held discriminatory intent to be an essential element of a constitutional violation in similar situations, its absence here did not deter the Fifth Circuit. It simply held that no discriminatory intent need be shown, relying on cases in which an entirely different problem was presented—disestablishment of admittedly de jure segregated schools. The holding is in direct and irreconcilable conflict with the applicable law as announced by this Court and a multitude of other Courts of Appeals. The cases cited as support for this departure (Appendix, pp. 132-133), with the exception of *Wright v. City of Brighon,* 441 F.2d 447 (5th Cir. 1969) cert. denied 404 U.S. 915, ____S.Ct.____ (in which the requisite intent was expressly found), are all cases in which intent was clearly immaterial because the school districts involved had previously been segregated pursuant to state law. "Unconstitutionality" was not an issue, it was an established fact and the only matter to be resolved was whether the school district had met its affirmative duty to dismantle the prior unlawful system. In cases of that type neutrality or absence of discriminatory intent in adopting a student assignment plan is clearly irrelevant. Such a school district is required by law to have an intent and that intent must be to dismantle a dual system and achieve a unitary one.

For the same reasons the Fifth Circuit's reliance on the decision of this Court in *Wright v. Council of the City of Emporia,* ____U.S.____, 92 S.Ct. 2196 (1972) is equally unfortuitous. (Appendix, p. 133) That case, like the others, was one in which absence of discriminatory intent

was immaterial because the county school system from which the city sought to withdraw was already under a court order to desegregate its de jure system. The attempted withdrawal would have impeded fulfillment of the affirmative duty to desegregate.

The Fifth Circuit's abandonment here of the requirement that discriminatory intent be shown conflicts with the decisions of Courts of Appeals in many other circuits which time and again have held that imbalance is a denial of equal protection only where it results from "deliberate", "purposeful", or "intentional" discrimination by the school board. *Lawlor v. Board of Education of the City of Chicago,* 458 F.2d 660, 662 (7th Cir. 1972), "purposeful discrimination"; *Keyes v. School District No. 1, Denver, Colorado,* 445 F.2d 990, 1006 (10th Cir. 1971) cert. granted, ____U.S.____, 92 S.Ct. 707, "intentional state action"; *U. S. v. School District 151 of Cook County, Illinois,* 404 F.2d 1125, 1132 (7th Cir. 1968) cert. denied 404 U.S. 943, ____S.Ct.____, "purposeful" segregation; *Offerman v. Nitkowski,* 378 F.2d 22, 24 (2d Cir. 1967), "purpose and effect" of producing segregation; *Deal v. Cincinnati Board of Education,* 369 F.2d 55, 63 (6th Cir. 1966) cert. denied 389 U.S. 847, 88 S.Ct. 38, "discriminatory state action"; *Bell v. School City of Gary, Indiana,* 324 F.2d 209, 213 (7th Cir. 1963) cert. denied 377 U.S. 924, 84 S.Ct. 1223, "intention or purpose to segregate"; *Taylor v. Board of Education of New Rochelle,* 294 F.2d 36, 39 (2nd Cir. 1961) cert. denied 368 U.S. 940, 82 S.Ct. 10, "purpose and effect to segregate"; *Spencer v. Kugler,* 326 F.Supp. 1235, 1241 (D.C.N.J. 1971), affirmed ____U.S.____, 92 S.Ct. 707, "intended" segregation.

The opinion of the Fifth Circuit not only conflicts with the cases just cited, it also conflicts with itself. For after holding that absence of discriminatory intent is immaterial and declining to review the record for evidence thereof it instructs the District, under the "Remedy" section of the opinion, that "one race schools (may) continue to exist" if school authorities "show that such schools are not the result of present or past discrimination". (Appendix, p. 138) The holding below does little to rectify the "very anomalous, new, and confusing situation" found to exist by Mr. Justice Black. (Appendix, p. 105)

The Fifth Circuit has cited no school case from this or any other circuit which dispensed with a showing of discriminatory intent on the part of the school board in reaching a conclusion that racial or ethnic imbalance in the school system was unconstitutional. This is the first such case. It has cited no case in which it has been held that a determination of the unconstitutionality of ethnic imbalance in the first instance is dependent on whether the school system under scrutiny has met the affirmative duty imposed upon de jure segregated schools which are under court order to desegregate. That is not the standard the District was obligated to meet here and the lower courts erred in holding to the contrary.

D. Absent a Showing That Ethnic Imbalance is Caused by the Discriminatorily Unequal Administration of a Student Assignment Plan Fair On Its Face, a Constitutional Violation Is Not Established.

In this case there was no evidence of a continuous shifting and gerrymandering of boundary lines to enforce separation of Mexican-American and Anglo-American chil-

dren in the schools such as existed in cases in which neighborhood school plans have been struck down. See *United States v. School District 151 of Cook County, Illinois,* 404 F.2d 1125 (7th Cir. 1968) cert. denied 404 U.S. 943, ____S.Ct.____; *Taylor v. Board of Education of New Rochelle,* 294 F.2d 36 (2nd Cir. 1961) cert. denied 368 U.S. 940, 82 S.Ct. 10.

A neighborhood school plan should not be held unacceptable if school attendance areas "have been reasonably arrived at" taking into account such factors as density of population, travel distance, and safety. See *Bell v. School City of Gary, Indiana,* 324 F.2d 209 (7eh Cir. 1963) cert. denied 377 U.S. 924, 84 S.Ct. 1223; *Sealy v. Department of Public Instruction of Pennsylvania,* 252 F.2d 898 (3rd Cir. 1958) cert. denied 356 U.S. 975, 78 S.Ct. 1139; *Downs v. Board of Education of Kansas City, supra* at 996-997 ("there is no showing that the Board acted arbitrarily . . ."); *Deal v. Cincinnati Board of Education, supra,* at 61 (". . . the fair minded judgment of the school officials is entitled to full consideration . . .").

The administration by school officials of a student assignment plan and other policies non-discriminatory on their face is directly analogous to the administration by other state officials of state statutes which are non-discriminatory on their face. The principle which should be controlling in a case such as this one was enunciated in *Snowden v. Hughes,* 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944):

> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional

> or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person . . . or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself. . . . But a discriminatory purpose is not presumed, . . .; there must be a showing of 'clear and intentional discrimination'. . . . Thus the denial of equal protection by the exclusion of Negroes from a jury may be shown by extrinsic evidence of a purposeful discriminatory administration of a statute fair on its face . . . but a mere showing that Negroes were not included in a particular jury is not enough; there must be a showing of actual discrimination because of race". (321 U.S. 8-9, 64 S.Ct. 401)

The adoption of such a rule is in keeping with the philosophy expressed in *Epperson v. Arkansas,* 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968):

> "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." (393 U.S. at 104; 89 S.Ct. at 270)

It is a rule which lends certainty to the educational process and uniformity to the law, which maintains the integrity of the Fourteenth Amendment, and which has been uniformly applied in principle by other Courts of Appeals in cases of this type. Because the lower courts have here strayed far from the path this petition for certiorari should be granted.

III. If Ethnic Imbalance Violates The Fourteenth Amendment, the District Should Be Afforded a Reasonable Time Within Which to Implement a Remedy and the Remedy Should Be Restricted To Those Schools at Which the Degree of Imbalance Is Unlawful.

The courts below concluded their procrustean application of black-white disestablishment law to the "novel" issues here presented by insisting that the District meet the time and scope requirements which have evolved in the course of dismantling dual school systems in the south. In *Swann v. Charlotte-Mecklenburg Board of Education* this Court said, with respect to desegregation of black-white schools which had not been accomplished after "nearly 17 years" that:

> ". . . The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution. (402 U.S. 15, 91 S.Ct. 1276)
>
> * * *
>
> . . . As with any equity case, the nature of the violation determines the scope of the remedy. (402 U.S. 16, 91 S.Ct. 1276)
>
> * * *
>
> "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies. (402 U.S. 15, 91 S.Ct. 1276)
>
> * * *
>
> " 'The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case.

> Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and the private claims.'" (402 U.S. 15, 91 S.Ct. 1276)

The lower courts have demonstrated none of the flexibility, mercy, or practicality referred to. They have treated the Corpus Christi Independent School system as though it had commenced disestablishment of a dual system maintained for Mexican-American and Anglo-American children in 1954 and had accomplished little or nothing to date. An all-encompassing reconstitution of the District was ordered, including district-wide reassignment of teachers and long distance pairing and clustering of schools (requiring massive transportation) "forthwith". The remedy ordered was inflexible, unmerciful, and impractical both as to time and scope.

A. The Time To Be Allotted: A Reasonable Time.

In 1955 when de jure segregated southern school systems were directed to desegregate "with all deliberate speed" Mexican-American and Anglo children attended all of this District's 36 white schools. In 1969 when this Court decided *Green v. School Board,* 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968) and *Alexander v. Holmes County Board of Education,* 396 U.S. 19, 90 S.Ct. 29, 24 L.Ed.2d 19 (1969), concluding that after 14 years the time for all deliberate speed had expired and that the remedy for disestablishment of de jure segregated black and white schools must be implemented "now", "forthwith", Mexican-American and Anglo-Amer-

ican children were jointly attending 57 of this District's 60 schools. There was no suggestion either in 1954 or prior to the trial in 1969 that an "unconstitutional" condition existed in the Corpus Christi schools. This District was not mandated by *Brown II* to commence a gradual revision of pre-existing student and teacher assignments which remained unaccomplished in 1969. *Brown v. Board of Education,* 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955). Yet in one fell stroke the trial court found a constitutional violation in facts which were "novel"—which presented issues "of first impression" —and directed the *instanter* dissolution and reconstitution of the entire system, no stays allowed.

Although the Court of Appeals reversed the trial court as to the specific plan ordered to be put into effect, it did not ameliorate in any respect the injustice of the trial court's requirement that the Corups Christi Independent School District accomplish overnight and at great expense what this court accorded de jure segregated systems a total of 14 years to achieve in the case of the Negro. Petitioner did not ask the trial court or the Court of Appeals for 14 years in which to make the ordered changes. It did ask, however, and here asks again for a demonstration of the "qualities of mercy and practicality" to which this Court referred in *Swann.*

Notwithstanding the very different facts existing here, there has been imposed upon petitioner a time schedule established to meet another problem in another day. In encountering and correcting the condition now newly held to offend the Constitution, it should be allowed the flexibility in terms of time and remedy which *Brown II* accorded southern school systems in 1955.

In *Swann* this court described the "fresh evidence of the dilatory tactics of many school authorities" in disestablishing de jure segregated school systems in explanation of the "forthwith" language contained in *Green* and *Alexander*. It referred to "the failure of local authorities to meet their constutional obligations" as precisely spelled out in *Brown II* and subsequent decisions. None of these circumstances exists here. The Corpus Christi Independent School District has not been disestablishing an unconstitutional system since 1955. It has not been dilatory. But it is being treated as though it had been. Neither the attitude of the petitioner nor the underlying facts warrants the inconsiderate response of the lower courts.

In *Brown II* this court noted the multitude of problems that would confront school districts as they bent to the task of disestablishing school systems segregated by law which then, for the first time, were being declared impermissible; it noted the time which would be required to solve the problems of desegregation. Now, for the first time, the lower courts have held that unintentional ethnic imbalance between Mexican-American and Anglo-American children likewise is unlawful. If that is the ultimate holding of this court, then this District should nevertheless be accorded a reasonable time after the final resolution of the issue within which to solve the "problems related to administration, arising from the physical condition of the school plant, the school transportation system [here the absence of such a system], personnel, revision of school districts and attendance areas. . . ." *Brown II*, 349 U.S. at 300, 75 S.Ct. at 756. The District is entitled to a reasonable transition period.

B. The Scope of the Proposed Remedy: Eliminate Imbalance at Those Specific Schools Where the Nature of the Imbalance Violates the Fourteenth Amendment.

Consistent with his unhesitating application to the new situation at hand of principles developed in connection with the disestablishment of southern, de jure segregated dual school systems, the trial court ordered an immediate, district-wide revision of the entire school district reassignment of teachers on the basis of district-wide ethnic ratios, pairing and clustering of schools, redrawing of boundary lines and the concomitant transportation of over 15,000 children at an estimated initial cost of $1.7 million.

No effort was made to determine or distinguish between those schools which had "constitutional" ethnic mixtures in 1969 and those which did not or those which had "constitutional" ethnic mixtures in 1954 and those which did not. Although this court suggested in *Swann* that a school district has no duty to readjust attendance at schools which had fallen out of ethnic balance because of changes in residential patterns, that is precisely what the lower courts have required of petitioner.

In response to the suggestion of both petitioner and of the United States that the remedy need not be system-wide the Court of Appeals stated that "there is established here an overwhelming pattern of unlawful segregation that has infected the entire school system. To select other than a system-wide remedy would be to ignore system-wide discrimination and make conversion to a unitary system impossible." (Appendix, p. 137)

What the Fifth Circuit meant by "system-wide *discrimination*" is not quite clear in view of its earlier statement that it specifically declined to determine whether there existed evidence of discriminatory intent because its absence was not relevant. (Appendix, pp. 130, 136, fn. 7) Nevertheless, the Corpus Christi Independent School District is not one in which there is "system-wide discrimination" requiring a "system-wide remedy,"

Mention has already been made of the fact that in 1969 Mexican-American and Anglo-American teachers were jointly teaching at each of the District's 60 schools. In that same year, when this case was tried, 39% of the high school age children were Mexican-American and 56% were Anglo-American. Mexican-American attendance at Ray High School was 24% and Anglo-American was 76%; at Carroll the percentages were 21 and 79. These ratios are not indicative of system-wide segregation or discrimination. The district-wide junior high school percentages were 48% Mexican-American and 46% Anglo-American: at Baker in 1969 24% of the enrollment was Mexican-American and 75% was Anglo; at Driscoll the percentages were 44 and 37, at Shannon 21 and 77, at South Park 59 and 39. These figures do not even intimate "system-wide discrimination."

The district-wide percentage of elementary children in 1969 was 55% Mexican-American and 41% Anglo-American: at Carroll Lane Elementary School in 1969 the Mexican-American-Anglo-American percentages were 23 and 76, at Central Park they were 32 and 67, at Fannin they were 64 and 36, at Houston they were 48 and 52, at Lexington they were 56 and 43, at Menger they were 35 and 64, at Oak Park they were 54 and 35, at Savage

they were 43 and 57. These figures belie "system-wide discrimination," and they are only examples. All shades of ethnic mixing existed in 1954, in 1969 and today.

Which degree of imbalance is it that violates the Fourteenth Amendment? In support of its edict that a system-wide remedy was required the Fifth Circuit cited *Green v. County School Board,* 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968). But *Green* was concerned with "dual" school systems maintained separate pursuant to state law in which "racial identification . . . was complete, extending not just to the composition of student bodies at the . . . schools but to every facet of school operation—faculty, staff, transportation, extra-curricular activities and facilities." 391 U.S. at 435; 88 S.Ct. at 1693. Needless to say, no findings of fact as to particular conditions to be remedied were necessary in such a case and a system-wide remedy was in order.

Here, however, there was no district-wide ethnic identification of schools on the basis of faculty, staff, transportation, extra-curricular activities or facilities, and the trial court did not so find.

If, as this court said in *Swann,* "the nature of the violation determines the scope of the remedy" there is no justification for requiring the Corpus Christi Independent School District to offset imbalance resulting from residential patterns. The objective of the courts should only be the elimination of the results of unconstitutional action. Imbalance resulting from residential patterns does not fall within that classification. School officials should only be required to remedy "the condition which they have caused," not all imbalance that exists. *Deal v. Cincinnati Board of Education, supra.*

Evaluating the decisions of the school board which the trial court only found did not "promote integration," the following suggestions as to remedy are far more consistent with the equitable principles described in *Swann* than those ordered by the lower courts:

(1) Boundary lines: If the location of boundary lines resulted in ethnic imbalance at schools, the schools should be identified and the boundaries redrawn.

(2) Location of new schools and renovation of old schools: Consistent with *Swann,* such schools "may remain all or largely of one race until new schools can be provided or neighborhood patterns change." (402 U.S. 25, 91 S.Ct. 1281) New schools should be built and old ones renovated to achieve the greatest intermixing possible consistent with existing or anticipated residential patterns.

(3) Transfer system: If the District's transfer system has resulted in ethnic imbalance it should be revised or eliminated.

(4) Busing of some students: If decisions of the Board as to the use of the four school buses employed in transportation of children to school resulted in ethnic imbalance, the transportation program should be revised.

(5) Optional transfer zones: If optional transfer zones produced ethnic imbalance at schools to which they related, the transfer zones should be eliminated.

(6) Expenditure of extraordinarily large sums of money: If the expenditure of funds resulted in ethnic

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imbalance, expenditures should be revised and the imbalance resulting therefrom eliminated.

(7) Assignment of teachers in disparate ratios: The teachers should simply be reassigned (as was in fact done).

(8) Failure to employ sufficient Mexican-American teachers: The District should simply be ordered to employ more Mexican-American teachers in the future.

(9) Failure to provide a majority-to-minority transfer rule: If failure to provide such a plan resulted in ethnic imbalance such a plan should be ordered into effect.

Although *Swann* is cited for the proposition that transportation is a permissible tool in disestablishing an unconstitutionally segregated school system, the precise holding of that case was that:

> "*In these circumstances* we find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation." (402 U.S. 30, 91 S.Ct. 1283)

The holding of the case cannot be disassociated from the facts. The "circumstances" there were that the school district in question did not begin to assign students on the basis of geographically drawn zones until 1965 (compared to a date before 1938 as to petitioner), and that without regard to desegregation plans it planned to transport approximately 23,000 students for an average daily round trip of fifteen miles (compared with petitioner's four buses, transporting only about 400 of its 46,000 students). Un-

der these circumstances this school district should not be ordered to achieve a district-wide ethnic balancing of its students through resort to transportation when existing imbalance is not system-wide. On the contrary, if any remedy is ordered it should be directed and restricted to such ethnic imbalance at specific schools as is the result of discriminatory board action. This will require a factual inquiry as to the existence and cause of imbalance at each specific school. If the task is substantial it is, nonetheless, a small price to pay for insurance that a "system-wide remedy" is not ordered when it is not required.

CONCLUSION

For the reasons set forth above, it is respectfully prayed that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted.

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CERTIFICATE OF SERVICE

This is to certify that on October 27, 1972, three copies of the foregoing Petition for Writ of Certiorari and the Appendix thereto were served upon each party of record by depositing each set of copies in a United States Post Office, with air mail postage prepaid, properly addressed to counsel of record as follows:

Mr. James P. Wolf, Dixie, Wolf & Hall, and Mr. James DeAnda, Attorneys for Respondents, 609 Fannin Street Building - Suite 401, Fannin Street at Texas Avenue, Houston, Texas 77002;

Hon. Richard G. Kleindienst, Attorney General of the United States, United States Department of Justice, Washington, D.C. 20530;

Hon. Erwin Griswold, Solicitor General of the United States, United States Department of Justice, Washington, D.C. 20530.

Richard A. Hall

Richard A. Hall

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-649

Supreme Court, U. S.
FILED
OCT 27 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 197_

No. 72-649

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT, ET AL, *Petitioners,*

v.

JOSE CISNEROS, ET AL, *Respondents.*

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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DISTRICT COURT'S FIRST MEMORANDUM OPINION

JOSE CISNEROS ET AL.

v.

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT, ET AL.

Civ. A. No. 68-C-95.

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

June 4, 1970.

MEMORANDUM OPINION

In Civil Action Number 68-C-95, a civil rights class action, the following will constitute the Findings of Fact and Conclusions of Law, and may be amended and/or supplemented at a later date,[1] but these Findings today will control and determine the disposition of the issues before us.

First, this court finds that it has jurisdiction and that this is a proper class action under Rule 23 of the Federal Rules of Civil Procedure.

Needless to say, this court considers this to be a most important case. Not only because of the great interest that has been manifested by the large attendance of citizens in the courtroom, and the amount of time and space the news media have devoted to the coverage of the trial,

1. The hearing of this case commenced on May 14, 1970 and continued daily thereafter, except from May 25 through May 29 (during which time the court attended the Fifth Circuit's Annual Judicial Conference), until the conclusion of the evidence on June 3, 1970.

but the court also realizes and understands that we are considering two of the most important aspects and interests of the school patrons and also of the school administration: the taxes of money and the children.

Because it is an important case I want again to express my appreciation for the efforts of the attorneys who have appeared here, not only for their cooperation in providing the court with all the relevant and pertinent evidence, voluminous data and statistics, but also for well-written briefs, and also for the expeditious manner in which the evidence was presented.

This type of legal controversy, which is prevalent all over the country, has finally come to the City of Corpus Christi, as it has come to many other communities over our land, and the magnitude of the problem is reflected in the great volume of litigation and opinions which we lawyers are familiar with.

Although, as you could realize, it has not been an easy task, I have had the advantage of three (3) weeks of night and day studying these exhibits, this voluminous data, taking two brief cases to Miami, constantly reading the opinions and having them available to me as they are published, and also, thanks to the attorneys in the case, of having the advantage of having daily copy made of the proceedings and testimony. One great advantage and help to the court was the way and manner all the statistical evidence was worked and catalogued at the beginning of the trial, and which was offered and stipulated to early in the trial, and which was available to the court for study for these three (3) weeks. We also were fortunate in having available every recent appellate decision concerning these matters.

Although the statistical data and evidence was largely undisputed, I find as a matter of fact for the record that the data presented by the plaintiffs is accurate and correct as to student populations, percentages of ethnic groups—that is, as we have called them in this trial, Anglo, Negro and Mexican-American — locations of schools, and the makeup of the student population, the location and ethnic patterns of general population within this area, the number of teachers, the schools they are assigned to, and the ethnic background of each teacher in each school, and the location of past and present boundaries, the time and cost of construction of new schools, the cost of renovating of old schools, the number of children bussed in the past and in the present, and who they were, and who they are.

I especially find that the plaintiffs' Exhibits No. 4,[2] 4-A,[3] 4-B,[4] 4-C,[5] and 4-D[6] are accurate and very illuminating.

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2. Plaintiffs' Exhibit 4 is a base map of the principal streets and freeway system of Corpus Christi, Texas.

3. Plaintiffs' Exhibit 4-A is a base map of Corpus Christi, Texas, which shows the geographic attendance zones for all elementary schools within the Corpus Christi Independent School District and which also shows whether the student population of elementary age within each such geographic attendance zone is less than 20%, 20-40%, 40-65%, or more than 85% non-Anglo-American.

4. Plaintiffs' Exhibit 4-B is a base map of Corpus Christi, Texas which shows the geographic attendance zones for all junior high schools within the district and whether the student population of junior high school age within each such zone is less than 15%, 20-25%, 60-65% or more than 90% non-Anglo-American.

5. Plaintiffs' Exhibit 4-C is a map of Corpus Christi, Texas which shows the geographic attendance zones for all high schools within the district and whether the student population within each such zone is less than 10%,20-25%, 75-90% or more than 90% non-Anglo-American.

6. Plaintiffs' Exhibit 4-D is a map of Corpus Christi, Texas which shows the city divided into the 27 geographic census tracts in which

The same is true for plaintiffs' Exhibits 6-A,[7] 6-B,[8] 6-C,[9] and plaintiffs' Exhibit 7,[10] also plaintiffs' Exhibit No. 35,[11] and plaintiffs' Exhibit 36.[12] The court accepts as true and correct the other objective data and statistics offered by the plaintiffs.

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the Census Bureau took the 1960 census. The map shows the total number of Negroes, Mexican-Americans and Anglo-Americans that resided within each such census tract in 1960.

7. Plaintiffs' Exhibit 6-A is a map of Corpus Christi, Texas which shows all the elementary schools within the district and the total number of Negro, Mexican-American and Anglo-American students and staff employees at each school during school years 1968-1969 and 1969-1970.

8. Plaintiffs' Exhibit 6-B is a map of Corpus Christi, Texas which shows the same information for each junior high school within the district as does plaintiffs' Exhibit 6-A for each elementary school (*supra*, note 7).

9. Plaintiffs' Exhibit 6-C is a map of Corpus Christi which shows the same information for each high school within the district as does plaintiffs' Exhibit 6-A for each elementary school. (*supra*, note 7).

10. Plaintiffs' Exhibit 7 shows graphically the number of children in each group (Negro, Anglo-American and Mexican-American) that during the 1969-1970 school year attended schools which had more than 90%, 80-90%, 70-80%, 60-70%, 50-60%, 40-50%, 30-40%, 20-30%, 10-20% or less than 10% non-Anglo-American enrollment. The information is presented separately for each of the three school levels (elementary, junior high, and senior high).

11. Plaintiffs' Exhibit 35 is a map of Corpus Christi which shows the locations of residential subdivisions in the city which have had deed restrictions limiting the right of ownership of lots to members of the white race. These subdivisions are very noticeably clustered along the south and north sides of a centrally located area of Corpus Christi, euphemistically referred to during the trial of this case as the "corridor," which contains a high density of Mexican-Americans and Negroes.

12. Plaintiffs' Exhibit 36 consists of the property records of each school in the district and shows original investment costs and subsequent site improvement and equipment costs for each of the schools.

Of course, most of this evidence, if not all, was furnished by the defendants, and the court is deeply appreciative of the cooperation, and of the long, tiresome work that the school administration had to undertake to furnish this data.

I also find that the defendants' objective statistical evidence is true and correct, such as defendants' Exhibits 1,[13] 2,[14] 2-A,[15] 3,[16] 3-A,[17] 4,[18] 5,[19] 6,[20] 7,[21] 9,[22] 10,[23] 11,[24] 14, 15 and 16.[25]

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13. Defendants' Exhibit 1 is a map of Corpus Christi showing the location and geographic attendance zone of each elementary school in the district with a tabulation, based upon October 10, 1969 enrollment figures, listing the total number of Negro, Mexican-American, Anglo-American and other ethnic groups enrolled in each school.

14. Defendants' Exhibit 2 is a map of Corpus Christi which shows for junior high schools in the district the same information that defendants' Exhibit 1 shows for the elementary schools (see, note 13, *supra*).

15. Defendants' Exhibit 2-A is a transparent overlay showing the same information as does defendants' Exhibit 2 (see, note 14, *supra*).

16. Defendants' Exhibit 3 is a map of Corpus Christi which shows for the senior high schools in the district the same information that defendants' Exhibit 1 shows for the elementary schools (see, note 13, *supra*).

17. Defendants' Exhibit 3-A is a transparent overlay which shows the same information as does defendants' Exhibit 3 (see, note 16, *supra*).

18. Defendants' Exhibit 4 is a tabular summary which shows as to each school the ethnic distribution of the district's teaching staff and pupils as of October 10, 1969 (see footnote 37, *infra*).

19. Defendants' Exhibit 5 is a tabular breakdown which shows for school year 1968-1969 the same information the defendants' Exhibit 5 shows for the 1969-1970 school year (see, note 18, *supra*).

20. Defendants' Exhibit 6 shows the 1954-1966 Census totals of the district's white and Negro children of each school age and preschool age.

The plaintiffs' and defendants' exhibits as mentioned mainly include objective evidentiary data over which there is no dispute, as I understand the parties, but I do understand that each side contends there are different factual and legal implications and conclusions to be drawn from this objective, statistical evidence which the court, of course, will have to decide. As to the other exhibits, the court will consider them and give to them whatever weight and credibility, as well as relevancy, the court feels

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21. Defendants' Exhibit 7 shows the total number and percent of the total student population in each school of Anglo-Americans, Spanish surnamed Americans and Negro-Americans for the 1954-55 school year, of white and Negro in school year 1957-58 and of white and Negro for school year 1961-62.

22. Defendants' Exhibit 9 is a letter dated May 12, 1970 from the district's department of personnel to its superintendent which indicates the following: the number of Mexican-American, Negro, and Anglo-American professional personnel employed as principals, counselors, and other specialists (other than regular classroom teachers); the number and percent of Anglo-Americans, Mexican-Americans and Negroes employed by the district in 1955-56, 1965-66, and 1969-70; the number of Anglo-American, Mexican-American and Negro teachers interviewed at specified colleges in 1955-56, in the spring of 1970, and from February 17th through May 8 of 1969; and, the total number to whom offers of employment have been made to each ethnic or racial group, with the offers also expressed in terms of the percentage relative to the total number of persons interviewed.

23. Defendants' Exhibit 10 is a tabulation which shows the number of classrooms available in each school for school year 1970-71. The exhibit was prepared May 18, 1970.

24. Defendants' Exhibit 11 is a copy of the Open Housing Ordinance adopted by the City of Corpus Christi on September 4, 1968.

25. Defendants' Exhibits 14, 15 and 16 are large student density maps of the district for elementary, junior high and senior high schools, respectively without regard to whether such students are Negro, Anglo-American or Mexican-American. These exhibits were not offered into evidence and, therefore, the court withdraws its consideration of them in this case. But the record is replete with other evidence, showing substantially the same information, which was offered and admitted into evidence.

they deserve in deciding the factual and legal issues involved.

Finally, the court recognizes that experts, similarly trained, similarly educated, and with good intentions, do disagree over fundamental issues.[26] And that is not only

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26. One particularly notable example is the differences in the views held by Dr. Lawrence D. Haskew, Professor of Education and Administration at the University of Texas at Austin, and by Dr. Thomas P. Carter, Professor of Education and Sociology at the University of Texas at El Paso. While both witnesses advocated removing all vestiges of discrimination against any group as soon as practicably possible and to create a society in which every one participates fully and on an equal basis, their thoughts on how this goal should be achieved were directly at odds with one another. Dr. Haskew, testifying for the defendants in favor of the "neighborhood school concept," stated that the neighborhood school has a much better opportunity to eliminate ethnic and racial barriers than almost anything else. Tr. p. 1220. In response to questions directed to the issue of whether this would be true in the case of where, because of residential segregation or otherwise, a neighborhood school system would cause the children to attend substantially segregated schools, Dr. Haskew replied affirmatively, stating that "education conducted for people in ghettos is the best route * * *" Tr. p. 1223. He testified that the important consideration is the quality of the education that is being offered, not where it is offered, and that if the education offered in the disadvantaged, segregated neighborhood makes the student mobile, in the sense of affording him abilities, he will be able to escape from the disadvantaged, segregated environment, provided also that the channels of society are opened to him. Dr. Haskew saw little benefit in transporting students from one area to another merely so that for only about eight hours a day they would be in an integrated environment. Dr. Carter, on the other hand, testified that to overcome existing patterns of ethnic or racial discrimination and to create equal societal participation by such ethnic or racial groups, integrating these groups in the schools is of overriding importance. Dr. Carter testified that as long as an ethnic or racial group is, through segregation, discriminated against in school, an indelible stigma is attached to belonging to that group and equal status interaction is foreclosed. In breaking down these racial or ethnic barriers, he emphasized that school integration can play a very significant role by stimulating social interaction between the various racial and ethnic groups and by broadening a child's reference or peer group to include persons of the other

true in the field of education, but this court sees it every day when we have trials with experts, where they disagree over the most basic and fundamental issues. And there have been some disagreements manifested during this trial that just could not be reconciled and the court must use its own judgment to see that justice is done after carefully considering all of the evidence. Although there has been a somewhat lack of basic empirical evidence which has been validated or demonstrated by experience or results, and the educators spoke of that often during the trial, the court must decide this case on the evidence before it.

Now to the issues in the case. It appears to the court that the controlling and ultimate issues, stated in general terms, are as follows:

First, can Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, and its progeny apply to Mexican-Americans in the Corpus Christi Independent School District; or, stated in another way, is *Brown* limited to Negroes only?

Second, if *Brown* can apply to Mexican-Americans, does it under the facts of this case? Stated in another way, assuming *Brown* applies to Mexican-Americans, are the Mexican-American students segregated or in a dual school system?

Third, because I think most of us agree that the Negroes in Corpus Christi are protected by the Four-

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ethnic or racial group. Dr. Carter testified that while integrating the schools provides an environment that is more conducive to academic achievement by the disadvantaged group, this factor is of secondary significance in comparison to the broader educational interests served —the stimulation and facilitation of equal-status interaction and the creation of mutual understanding and acceptance.

teenth Amendment to the Constitution under *Brown*, as it was a case involving black and whites, and later Supreme Court and Fifth Circuit cases, the question or issue here is: do we have a dual or unitary school system as it affects Negroes in Corpus Christi?

Further, or fourth, if we do have a dual school system here as defined by recent Fifth Circuit cases, and that Negroes and Mexican-Americans are denied their Constitutional rights under the Fourteenth Amendment, is this a de jure or de facto dual or segregated school system?

And finally, if we do have a dual system, how can the court, and under what plans and programs, disestablish a dual school system and establish and maintain a unitary school system in contemplation and compliance with the recent Supreme Court and Fifth Circuit opinions?

[1-4] And so, in determining the first general issue in this case, which is whether *Brown* can apply to Mexican-Americans in the Corpus Christi Independent School District, the court now makes the following observations concerning the implications of *Brown* to this issue: This court reads *Brown* to mean that when a state undertakes to provide public school education, this education must be made available to all students on equal terms, and that segregation of any group of children in such public schools on the basis of their being of a particular race, color, national origin, or of some readily identifiable, ethnic-minority[27] group, or class deprives these children of

27. To avoid any misunderstanding of the court's use of the adjective "minority" throughout its oral opinion in its references to the ethnic group or groups to which the *Brown* school case rationale is applicable, some further comment is probably warranted. The court used the term "minority" simply because the case involves ethnic

the guarantees of the Fourteenth Amendment as set out in *Brown*, and subsequent decisions, even though the physical facilities and other tangible factors may be equal.

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groups that are numerically in the minority. Nationally, Mexican-American and Negro populations are decidedly in the minority (see, chart in footnote 31, *infra*). They are each also in the minority within the Corpus Christi Independent School District (see footnote 30, *infra*), although the district's Mexican-American population perhaps is presently a minority only marginally. The court recognizes that either group may represent a majority in the United States at some time in the future, that each group undoubtedly presently represents a majority in some communities and areas of the country, and that either group may someday represent a majority in the Corpus Christi Independent School District. Even today, if considered together, the Negro and Mexican-American residents of Corpus Christi somewhat outnumber the rest of the city's population. But whether or not a group represents a numeric minority or majority of a certain population is not the controlling inquiry. In the context of the present case, the relevant inquiry is whether the Mexican-Americans and Negroes residing within the Corpus Christi Independent School District are, as a group, or groups, being discriminated against in the schools through segregation, not whether they represent a majority or a minority of the district's population. By simply being, or becoming a majority of the population of the relevant area will not, by itself, prevent, or remove the vestiges of, discrimination against that group, whether in the schools (through segregation) or otherwise. Political and economic power promise the only meaningful non-judicial protection against such discrimination. Simply constituting a plurality of the relevant population does not mean, although it may, that the group has the necessary economic power. Nor is the potential political power possessed by a group constituting a plurality necessarily effectively exercised through the election of adequate political representation. Without either economic or political power, admittance into existing power structures is seldom possible. When a group, as a whole is politically impotent and economically disadvantaged, it invariably will find itself subordinated, in one respect or other, to those who are politically and economically stronger. It seems logical enough to assume that the larger a disadvantaged group is, or becomes, the more political and economic power it acquires, and, consequently the less susceptible it is to domination, repression, discrimination, or control by the more advantaged groups in the society. But this will always be only a difference in degree, for as long as political and economic power are concentrated in certain groups, to the exclusion of others, the disadvantaged group will be discriminated against or

Although these cases speak of race and color, we must remember that these cases were only concerned with blacks and whites. But it is clear to this court that these cases are not limited to race and color alone.[28] In this

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repressed, whether blatantly or subtlely, in one form or another. When this occurs in the public schools, through the establishment of a substantially segregated school system in which the children of the disadvantaged group or groups generally attend schools that the children of the more advantaged group or groups do not attend, a problem of constitutional magnitude is presented. See footnote 30, *infra*.

The court's rationale, similar to that announced in Hobson v. Hansen, 269 F.Supp. 401 (D.D.C. 1967), requires that two judicial determinations be made: (1) which groups in the school district in question are underprivileged and politically and economically disadvantaged; and (2) which, if any, of these groups are being unreasonably segregated in the district's schools? In the present case, the evidence has shown that the Negroes and Mexican-Americans residing within the Corpus Christi Independent School District are underprivileged and politically and economically disadvantaged and are both unreasonably segregated in the district's schools.

Obviously, the groups that qualify under the announced test will vary in time and place: some racial or ethnic groups presently underprivileged and disadvantaged may in the future achieve equal or even dominant social status; some racial or ethnic groups that are underprivileged and politically and educationally disadvantaged in some communities may represent the dominant and advantaged segment of others; and, of course, even though a group may be underprivileged and disadvantaged in a particular school district, the group may be integrated in the schools of that district with the more advantaged segments of the community to such an extent that the requisite harmful effect is lacking. The present case concerns only the Negro and Mexican-American residents in the Corpus Christi Independent School District and concerns conditions there only as they now exist. Conditions elsewhere undoubtedly vary, and the situation here may be different in the future.

28. Through the years an "education" has come to be recognized as being a critically important interest, similar to the right to vote, fundamental to a meaningful participation in a democratic society. The *Brown* school decision, and subsequent cases, represent a judicial recognition of the constitutional significance of this interest, expressing it in terms of equal educational opportunity under the equal protection clause of the Fourteenth Amendment. As stated by Mr. Chief Justice Warren in the *Brown* decision:

case, if the proof shows that the Mexican-Americans in the Corpus Christi Independent School District are an

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"[Education] is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."

347 U.S. 483, 493, 74 S.Ct. 686, 691 (1954). These words were never truer than they are today. For this reason, state and local school policies are being tested ever more closely in terms of Constitutional equal protection.

Some may argue that the Fourteenth Amendment's historic concern for the Negro [cf. The Slaughter House Cases, 83 U.S. (16 Wall) 36, 71-72, 21 L.Ed. 394, (1873)] and the Negro's long history of political and economic disadvantagement provide a rational basis for affording the Negro with a broader right under the Fourteenth Amendment in the area of educational opportunity. This court rejects such reasoning as being patently unsound. Any other group which is similarly or perhaps equally, disadvantaged politically and economically, and which has been substantially segregated in public schools, should receive no less effective constitutional protection of this important right.

It was decided as early as 1886 that although the Fourteenth Amendment may have been primarily concerned with Negroes, its protection is certainly not limited to them. Yick Wo v. Hopkins, 118 U.S. 356, 369, 6 S.Ct. 1064, 30 L.Ed. 220. And to reason that even though it applies to other groups, its applicability to other groups is of a more limited and restricted nature, would require one to assume that the Negro is nvariably and significantly less able to obtain equal justice in the political arena than is any other group. First of all, the assumption is entirely unjustified. At best this would be a factual issue, and in this case the evidence does not warrant an affirmative answer to such an inquiry. Even if the evidence had shown that the Negro is less able to obtain equal justice in the political arena than any other politically and economically disadvantaged group, the court would not consider this a sufficient basis for concluding that the former group's rights under the Fourteenth Amendment should be more pervasive or extensive than another's group's rights.

It is possible that Negroes may have disabilities resulting from phychological conditions caused by their long history of slavery and by governmental and private discrimination. Also the discrimination directed against the Negro may be more intransigent than the dis-

identifiable, ethnic-minority[29] group, and for this reason have been segregated and discriminated against in the schools in the manner that *Brown* prohibits, then they are certainly entitled to all the protection announced in *Brown*. Thus *Brown* can apply to Mexican-American students in public schools.

Having decided that *Brown* can apply to Mexican-American students in public schools, the court now must determine whether under the facts of this case the Mexican-American students in the Corpus Christi Independent School District do fall within the protection of *Brown*.

[5, 6] The court finds from the evidence that these Mexican-American students are an identifiable, ethnic-minority[30] class sufficient to bring them within the protection of *Brown*.

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crimination directed against any other group. If so, perhaps there is at least a conceivable basis for distinguishing the Negro from other groups with respect to the Constitutional protection that should be afforded. But the evidence in this case indicates that, at least in the Corpus Christi Independent School District, no less protection should be fashioned for the district's Mexican-Americans than for its Negroes, for the Mexican-Americans residing in this district have experienced deprivations and discriminations similar to those suffered by the district's Negroes, and they share with the Negro the special problems involved in overcoming existing divisive conditions and the stigma and disadvantage that have accompanied their segregation.

29. See note 27, *supra*.

30. *Id.* When asked whether the Mexican-Americans are an identifiable group in the context of the issues raised in this case, Dr. Thomas Carter, whose qualifications as an expert witness on this point are set forth in footnote 38, *infra*, testified as follows:

A. I find that a very peculiar question. The United States census, United States Government, The Texas Government, everyone considers this a minority, and an ethnic minority or a cultural minority. In social science, a minority is a group of people who may be a physical majority, but a minority is a group of people who are not full participants in the dominant society. In other

It is clear to this court that Mexican-Americans, or Americans with Spanish surnames, or whatever they are

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words, there is discrimination. They don't fill their proportional number of doctors, lawyer, merchant, and chief kind of slot in the society. They have been established in a—particularly in Texas, it has been established that many laws were discriminatory against Mexican-Americans. So both from a legal point of view, a Government point of view, and a social-science point of view, they are a minority.

Looking at it culturally, they are an identifiably different group with adherence to the Spanish language, certain physical characteristics that are more or less Indian or mistisaje or the blending of the Spanish and the Mexican. So, no matter how you cut it, you are going to come out as a minority, both from social-science and from the legal point of view, and from the cultural point of view, and the racial point of view.

THE COURT: What was the last one?

THE WITNESS: And the racial point of view.

I have heard that question raised before.

Q. It wasn't mine originally, Dr. Carter. When you say that they are an ethnic group from the social point of view, does that include, for example, income status?

A. Yes. Again, a minority, from a social scientist's point of view, is any group of people that do not participate proportionately with their number in the different occupation levels or income levels or residential distribution within a community. Any one of those factors can be considered a characteristic of a minority.

Tr. pp. 52-53.

* * * * *

Q. In your studies, have you discovered differences in the Anglo-Saxon culture emanating from Western Europe and England, and the Mexican culture?

A. Well, of course, a great body of literature exists that differentiates the two. My own thinking on this is that we have exaggerated the difference, and the difference was much greater in the past. But the two traditions, the Mexicans or the Indian-Spanish tradition of the south of the border, and the Protestant-English tradition do represent two identifiably different cultural trends.

Again, I think it was more obvious in the past than it is now, but most assuredly there have been many studies that will identify cultural characteristics of both groups, or any other number of groups also.

Tr. p. 54.

called, or whatever they would like to be called, Latin-Americans, or several other new names of identification—and parenthetically the court will take notice that this naming for identification phenomena is similar to that experienced in the Negro groups: black, Negro, colored, and now black again, with an occasional insulting epithet that is used less and less by white people in the South, fortunately. Occasionally you hear the word "Mexican" still spoken in a derogatory way in the Southwest—it is clear to this court that these people for whom we have used the word Mexican-Americans to describe their class, group, or segment of our population, are an identifiable ethnic-minority in the United States, and especially so in the Southwest,[31] in Texas[32] and in Corpus Christi.[33] This

31. The court takes judicial notice of the 1960 U. S. Census of Population and a special study by the Bureau of the Census, entitled Persons of Spanish Surname, which was based upon the 1960 Census. These two documents indicate the following with respect to the 5 Southwestern States, where the populations in this country of persons with Spanish surnames are the greatest:

	Spanish Surname	Total Population
1. 1960 Census		
Arizona	194,356	1,302,161
California	1,426,538	15,717,204
Colorado	157,174	1,753,947
New Mexico	269,122	951,023
Texas	1,417,810	9,579,677
2. 1950 Census:		
Arizona	128,580	749,587
California	758,400	10,586,223
Colorado	118,715	1,325,089
New Mexico	248,560	681,187
Texas	1,027,455	7,711,194

32. See the figures for Texas that are contained in the preceding footnote.

33. Plaintiffs' Exhibit 8, a copy of the 1960 Corpus Christi, Texas Census as officially compiled by the Bureau of the Census shows the

is not surprising; we can notice and identify their physical characteristics, their language, their predominant religion, their distinct culture, and, of course, their Spanish surnames. And if there were any doubt in this court's mind, this court could take notice, which it does, of the congressional enactments, governmental studies and commissions on this problem.[34] And also, the opinions, such as Hernandez v. Texas, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866, a 1954 case; Judge Allred's decision in the case, Hernandez v. The Driscoll Consolidated Independent School District, Civil Action No. 13840, unpublished;

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following 1960 population totals with respect to Nueces County and Corpus Christi:

	Total	Nueces County Corpus Christi	Balance
White (other than Spanish Surname)	126,794	98,504	28,290
Negro	10,108	9,156	952
Other races	285	171	114
White: Spanish Surname	84,386	59,859	24,527
Total Population	221,573	167,690	53,883

34. Title IV of the Civil Rights Act of 1964, 42 § 2000c et seq.; Hearing Before the United States Commission on Civil Rights, held in San Antonio, Texas (December 9-14, 1968); Report I: Ethnic Isolation of Mexican-American in Public Schools of the Southwest, Mexican-American Educational Study, United States Comm'n on Civil Rights (August 1970); 45 C.F.R. Part 80, H.E.W. Dept'l Reg. (January 1, 1970) (purpose of which is to effectuate provisions of Title VI of the Civil Rights Act of 1964 to the end that no person in the U. S. shall, on the ground of race, color, or national origin, be subjected to discrimination under any program or activity receiving financial assistance from the Department of H.E.W.); the Congressional creation of the Committee on Opportunities for Spanish Speaking People, P.L. 91-181, 83 Stat. 838 (1969) (the purpose of which is to help assure that Federal programs are reaching this group, to provide assistance it needs, and to seek out new programs that may be necessary to handle problems that are unique to such persons —who represent one of the nation's largest minorities).

Keyes, et al., v. School District Number 1,[35] the Westminister School of Orange County v. Mendez, 161 F.2d 774 (9 Circuit, 1947); and also, and very importantly, the recent Federal Government's intervention in Marcos Perez, et al., v. The Sonora Independent School District, Number 6-224 Civil, San Angelo Division of the Northern District of Texas.

This court further finds that the Mexican-American students in the Corpus Christi Independent School District are now separated and segregated to a degree prohibited by the Fourteenth Amendment[36] in all three levels of the school system: elementary, junior high, and senior high.[37]

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35. 303 F. Supp. 279 (D. Colo.), remanded, mod., 303 F. Supp. 289 (D. Colo.), vacated, (10th Cir.), reinstated, 396 U.S. 1215, 90 S.Ct. 12, 24 L.Ed.2d 37 (1969).

36. The summarizations of pertinent evidence in footnotes 37, 38 and 39, *infra*, clearly show that the Mexican-American students are substantially separated and segregated from the remainder of the district's student population. The accompanying textual statement that this condition constitutes constitutionally impermissible segregation is a conclusion based upon this fact of segregation, plus certain additional considerations which are set forth in the text and accompanying footnotes following this statement.

37. Plaintiffs' Exhibit 3-A and defendants' Exhibit 4 are tabular summaries of the ethnic distribution of the students and teaching staff in each of the various schools in the district for the 1969-70 school year, reflecting the number of students and teachers, by ethnic groups, at each high school, junior high school and elementary school. The breakdown of the student and teacher distribution is also given by percentages. The numbers are totaled for each level of school, and totals for the entire district are also given. Because the two exhibits reflect the same information, with only insignificant differences in the tabulations, only defendants' Exhibit 4 is reproduced here.

EXHIBIT 4
CORPUS CHRISTI PUBLIC SCHOOLS
Corpus Christi, Texas
ETHNIC DISTRIBUTION 1969–1970
Teaching Staff and Pupils
As of October 10, 1969

School		American Indian		Oriental		Negro		Spanish Sur-name Amer.		Anglo American		Total
		No.	%	No.	%	No.	%	No.	%	No.	%	
Carroll	P	—	—	2	0.10	—	—	416	21.05	1558	78.85	1976
	T	—	—	—	—	—	—	6	6.52	86	93.48	92
King	P	—	—	—	—	5	0.24	193	9.23	1893	90.53	2091
	T	—	—	—	—	—	—	7	7.29	89	92.71	96
Miller	P	—	—	—	—	282	13.70	1351	65.61	426	20.69	2059
	T	—	—	—	—	3	3.09	16	16.50	78	80.41	97
Moody	P	—	—	—	—	168	10.57	1363	85.78	58	3.65	1589
	T	—	—	—	—	5	6.49	14	18.18	58	75.33	77
Ray	P	—	—	3	0.14	4	0.19	502	23.61	1617	76.06	2126
	T	—	—	—	—	—	—	4	4.04	95	95.96	99
Total Sr. Highs	P	—	—	5	0.05	459	4.66	3825	38.87	5552	56.42	9841
	T	—	—	—	—	8	1.73	47	10.20	406	88.07	461
Baker	P	—	—	1	0.09	3	0.26	276	24.30	856	75.35	1136
	T	—	—	—	—	2	3.92	10	19.61	39	76.47	51
Barnes	P	—	—	—	—	36	3.30	1023	94.03	29	2.67	1088
	T	—	—	—	—	3	5.77	20	38.46	29	55.77	52
Browne	P	—	—	—	—	—	—	74	8.68	779	91.32	853
	T	—	—	—	—	1	2.44	7	17.07	33	80.49	41
Coles	P	—	—	—	—	218	36.95	342	57.97	30	5.08	590
	T	—	—	—	—	4	11.77	12	35.29	18	52.94	34
Cullen	P	—	—	—	—	—	—	66	6.18	1002	93.82	1068
	T	—	—	—	—	—	—	6	12.00	44	88.00	50
Cunningham	P	—	—	—	—	147	10.21	1267	87.99	26	1.80	1440
	T	—	—	—	—	2	3.03	13	19.70	51	77.27	66
Driscoll	P	—	—	—	—	190	18.23	460	44.15	392	37.62	1042
	T	—	—	—	—	2	4.08	11	22.45	36	73.47	49
Haas	P	—	—	2	0.35	—	—	63	10.99	508	88.66	573
	T	—	—	—	—	—	—	5	16.67	25	83.33	30
Hamlin	P	—	—	—	—	—	—	90	7.75	1072	92.25	1162
	T	—	—	—	—	1	2.00	4	8.00	45	90.00	50
South Park	P	—	—	1	0.10	8	0.79	609	59.82	400	39.29	1018
	T	—	—	—	—	1	2.22	8	17.78	36	80.00	45
Sundeen	P	—	—	—	—	8	1.28	135	21.60	482	77.12	625
	T	—	—	—	—	1	3.03	1	3.03	31	93.94	33
Wynn Scale	P	—	—	—	—	9	0.75	1103	92.07	86	7.18	1198
	T	—	—	—	—	2	3.63	13	23.64	40	72.73	55
Total Jr. Highs	P	—	—	4	0.03	619	5.25	5508	46.71	5662	48.01	11793
	T	—	—	—	—	19	3.42	110	19.78	427	76.80	556
Allen	P	—	—	—	—	6	0.67	827	91.99	66	7.34	899
	T	—	—	—	—	1	2.94	9	26.47	24	70.59	34
Austin	P	—	—	—	—	—	—	766	97.70	18	2.30	784
	T	—	—	—	—	1	3.34	10	33.33	19	63.33	30
Beach	P	—	—	—	—	—	—	76	55.88	60	44.12	136
	T	—	—	—	—	—	—	2	33.33	4	66.67	6
Calk	P	—	—	—	—	—	—	85	14.89	486	85.11	571
	T	—	—	—	—	—	—	1	5.00	19	95.00	20
Carroll Lane	P	—	—	—	—	1	0.18	130	23.21	429	76.61	560
	T	—	—	—	—	—	—	3	14.29	18	85.71	21
Casa Linda	P	—	—	—	—	—	—	147	35.68	265	64.32	412
	T	—	—	—	—	—	—	1	6.25	15	93.75	16
Central Park	P	1	0.13	2	0.27	2	0.27	241	32.09	505	67.24	751
	T	—	—	—	—	1	3.70	1	3.70	25	92.60	27
Chula Vista	P	—	—	—	—	—	—	540	96.60	19	3.40	559
	T	—	—	—	—	1	4.76	7	33.33	13	61.91	21
Crockett	P	—	—	—	—	46	6.39	653	90.69	21	2.92	720
	T	—	—	—	—	—	—	7	26.92	19	73.08	26
Crossley	P	—	—	—	—	377	80.38	88	18.76	4	0.86	469
	T	—	—	—	—	2	9.52	9	42.86	10	47.62	21
Evans	P	—	—	—	—	28	6.48	402	93.06	2	0.46	432
	T	—	—	—	—	1	5.56	6	33.33	11	61.11	18
Fannin	P	—	—	—	—	3	0.40	474	63.71	267	35.89	744
	T	—	—	—	—	1	3.57	5	17.86	22	78.57	28

BLEED THROUGH POOR COPY

School		American Indian		Oriental		Negro		Spanish Sur-name Amer.		Anglo American		Total
		No.	%	No.	%	No.	%	No.	%	No.	%	
Fisher	P	—	—	1	0.22	—	—	59	12.85	399	86.93	459
	T	—	—	—	—	—	—	1	4.76	20	95.24	21
Fraser	P	—	—	—	—	—	—	90	14.78	519	85.22	609
	T	—	—	—	—	1	4.55	1	4.55	21	90.90	23
Furman	P	—	—	—	—	7	1.19	522	88.93	58	9.88	587
	T	—	—	—	—	—	—	3	13.64	19	86.36	22
Garcia	P	—	—	—	—	126	27.81	327	72.19	—	—	453
	T	—	—	—	—	2	11.76	4	23.53	11	64.71	17
Gibson	P	—	—	—	—	—	—	56	17.95	256	82.05	312
	T	—	—	—	—	—	—	2	14.29	12	85.71	14
Houston	P	—	—	—	—	2	0.29	327	47.81	355	51.90	684
	T	—	—	—	—	—	—	3	11.11	24	88.89	27
Kestoryz	P	—	—	2	0.27	—	—	262	36.14	461	63.59	725
	T	—	—	—	—	1	3.85	3	11.54	22	84.61	26
Lamar	P	—	—	—	—	6	1.12	530	98.70	1	0.18	537
	T	—	—	—	—	1	4.76	5	23.81	15	71.43	21
Lexington	P	—	—	2	0.41	—	—	274	56.26	211	43.33	487
	T	—	—	—	—	—	—	2	10.53	17	89.47	19
Los Encinos	P	—	—	—	—	41	12.46	245	74.47	43	13.07	329
	T	—	—	—	—	1	7.70	4	30.77	8	61.53	13
Lozano	P	—	—	—	—	43	6.11	660	93.75	1	0.14	704
	T	—	—	—	—	1	3.85	13	50.00	12	46.15	26
Meadowbrook	P	1	0.17	—	—	—	—	50	8.46	540	91.37	591
	T	—	—	—	—	1	4.55	4	18.18	17	77.27	22
Menger	P	—	—	—	—	5	1.16	152	34.78	280	64.07	437
	T	—	—	—	—	—	—	3	16.67	15	83.33	18
Montclair	P	—	—	2	0.29	—	—	35	5.02	660	94.69	697
	T	—	—	—	—	—	—	1	4.00	24	96.00	25
Moore	P	—	—	—	—	—	—	155	30.88	347	69.12	502
	T	—	—	—	—	1	5.26	2	10.53	16	84.21	19
Oak Park	P	1	0.15	—	—	71	10.26	375	54.19	245	35.40	692
	T	—	—	—	—	1	4.00	3	12.00	21	84.00	25
Parkdale	P	—	—	—	—	—	—	113	18.20	508	81.80	621
	T	—	—	—	—	—	—	3	12.50	21	87.50	24
Prescott	P	—	—	—	—	9	1.50	571	95.33	19	3.17	599
	T	—	—	—	—	1	4.35	8	34.78	14	60.87	23
Sanders	P	—	—	—	—	—	—	15	4.56	314	95.44	329
	T	—	—	—	—	1	7.69	2	15.39	10	76.92	13
Savage	P	—	—	—	—	—	—	152	43.06	201	56.94	353
	T	—	—	—	—	—	—	2	13.33	13	86.67	15
Schanen	P	—	—	1	0.17	—	—	20	3.28	588	96.55	609
	T	—	—	—	—	1	4.35	3	13.04	19	82.61	23
Shaw	P	—	—	—	—	144	18.49	623	79.97	12	1.54	779
	T	—	—	—	—	2	6.06	7	21.21	24	72.73	33
Smith	P	—	—	—	—	5	1.03	61	12.66	416	86.31	482
	T	—	—	—	—	1	5.56	1	5.56	16	88.88	18
Southgate	P	—	—	1	0.22	16	3.51	439	96.27	—	—	456
	T	—	—	—	—	2	10.00	8	40.00	10	50.00	20
Travis	P	—	—	—	—	1	0.10	911	90.74	92	9.16	1004
	T	—	—	—	—	1	2.78	7	19.44	28	77.78	36
Washington	P	—	—	—	—	448	94.71	25	5.29	—	—	473
	T	—	—	—	—	6	30.00	1	5.00	13	65.00	20
Wilson	P	—	—	—	—	—	—	20	3.63	531	96.37	551
	T	—	—	—	—	1	4.55	1	4.55	20	90.90	22
Windsor Park	P	—	—	—	—	—	—	62	13.81	387	86.19	449
	T	—	—	—	—	—	—	1	5.88	16	94.12	17
Woodlawn	P	—	—	—	—	5	0.86	62	10.71	512	88.43	579
	T	—	—	—	—	1	4.55	2	9.09	19	86.36	22
Yeager	P	—	—	—	—	—	—	32	6.70	446	93.30	478
	T	—	—	—	—	1	5.00	3	15.00	16	80.00	20
Zavala	P	—	—	—	—	2	0.28	687	95.68	29	4.04	718
	T	—	—	—	—	1	3.45	7	24.14	21	72.41	29
Driscoll Hospital	P	—	—	—	—	1	16.67	5	83.33	—	—	6
	T	—	—	—	—	—	—	—	—	1	100.00	1
Ada Wilson	P	—	—	—	—	2	3.28	40	65.57	19	31.15	61
	T	—	—	—	—	—	—	—	—	3	100.00	3
Total Elementary	P	3	0.01	11	0.04	1397	5.73	12386	50.78	10592	43.44	24389
	T	—	—	—	—	37	3.92	171	18.09	737	77.99	945

CORPUS CHRISTI PUBLIC SCHOOLS
Corpus Christi, Texas

ETHNIC DISTRIBUTION TOTALS 1969-1970

		American Indian		Oriental		Negro		Spanish Sur-Name Amer.		Anglo American		Totals
		No.	%	No.	%	No.	%	No.	%	No.	%	
TeLah Senior High	Pupils	—	—	5	0.05	459	4.66	3,825	38.87	5,552	56.42	9,841
	Teachers	—	—	—	—	8	1.73	47	10.20	406	88.07	461
Junior High	Pupils	—	—	4	0.03	619	5.25	5,508	46.71	5,562	48.01	11,793
	Teachers	—	—	—	—	19	3.42	110	19.78	427	76.80	556
Elementary	Pupils	3	0.01	11	0.04	1,397	5.73	12,386	50.78	10,592	43.44	24,389
	Teachers	—	—	—	—	37	3.92	171	18.09	737	77.99	945
Total All Schools	Pupils	3	0.01	20	0.04	2,475	5.38	21,719	47.19	21,806	47.38	46,023
	Teachers	—	—	—	—	64	3.26	328	16.72	1,570	80.02	1,962
Other Professional Personnel		-	—	—	—	1		13		118		132
GRAND TOTAL	Pupils	3	0.01	20	0.04	2,475	5.38	21,719	47.19	21,806	47.38	46,023
	Teachers	—	—	—	—	65		341		1,688		2,094

Footnote 37—Continued

Defendants' Exhibit 4 indicates: that of the approximately 24,389 elementary students, 43.44% were Anglo-American and 50.78% were Mexican-American; that of the approximately 11,793 junior high school students, 48.01% were Anglo-American and 46.71% were Mexican-American; and that of the approximately 9841 senior high school students, 56.42% were Anglo-American and 38.87% were Mexican-American. If the district's Mexican-American and Anglo-American student populations had been ideally integrated during the school year 1969-70, the percentage of each group's enrollment in each school in the district would have been approximately the same as that group's percentage representation of the total student population in the district for that school level. Even a cursory inspection of the exhibit reproduced above indicates that very few students attended such a school during the last school year. This condition finds graphic expression in plaintiffs' Exhibit 7. This exhibit, summarizing the same numeric data contained in plaintiffs' Exhibit 3-A and defendants' Exhibit 4, shows the following:

a. As to high schools, out of a total enrollment for the 1969-70 school year of approximately 9841 (plaintiffs' exhibit 3-A shows 9836), approximately 1,531 Mexican-Americans and Negroes (less than 200 Negroes) attended schools with more than 90% non-Anglo-American enrollment; approximately 1,633 Mexican-Americans and Negroes (less than 30 Negroes) attended schools with from 70 to 80% non-Anglo-American enrollment; no high school had 30 to 70% non-

It is obvious to the court from the evidence that the Mexican-Americans have been historically discriminated against as a class in the Southwest and in Texas, and in the Corpus Christi District. This court is convinced that this history of discrimination as given by Dr. Thomas

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Footnote 37—Continued

Anglo enrollment; approximately 3,175 Anglo-Americans attended schools with only 20 to 30% non-Anglo-American enrollment (922 Mexican-Americans); and approximately 1893 Anglo-Americans attended schools with less than 10% non-Anglo-American enrollment.

b. As to junior high schools, out of a total enrollment for 1969-1970 of approximately 11,793 (plaintiffs' Exhibit 3-A shows 11,789), approximately 4,145 Mexican-American and Negro children (approximately 400 Negroes) attended schools where the non-Anglo-American enrollment was greater than 90%; only about 2,059 students attended schools where the non-Anglo-American enrollment was from 60-70%; no students attended schools where the non-Anglo-American enrollment was from 30-60%; approximately 1338 Anglo-Americans attended schools where the non-Anglo (or Mexican-American) enrollment was only from 20-30%; approximately 508 Anglo-Americans attended schools where the non-Anglo (Mexican-American) enrollment was only 10-20%; and approximately 2,853 Anglo-Americans attended schools where the non-Anglo-American enrollment was less than 10%.

c. As to elementary schools, out of a total enrollment of approximately 24,389, approximately 10,178 Mexican-Americans and Negroes (about 1,250 Negroes) attended schools where over 90% of the enrollment was non-Anglo-American; approximately 3,482 Anglo-Americans attended schools where the non-Anglo-American enrollment was 10-20%; and approximately 3,079 Anglo-Americans attended schools where the non-Anglo-American enrollment was less than 10%.

Although the court has specifically dealt with the 1969-70 school year, the file is replete with other evidence showing that this condition of the Mexican-Americans being substantially segregated in the schools has existed through the years. See, *e. g.*, plaintiffs' Exhibit 3-B and defendants' Exhibit 5 for the 1968-69 school year, plaintiffs' Exhibit 33 for 1967-1968; plaintiffs' Exhibit 8 for 1960; defendants' Exhibit 7 for 1954-1955 and defendants' Exhibit 17 for senior high ethnic composition for school years 1949-1950 through 1967-1968.

Plaintiffs' Exhibits 4-A, 4-B, 4-C, 4-D, 6-A, 6-B, 6-C, 7 (described in footnotes 3, 4, 5, 6, 7, 8, 9 and 10 respectively) and defendants' Exhibits 1, 2, 2-A, 3, 3-A, 4, 5, 6 and 7 (described in footnotes 13, 14, 15, 16, 17, 18, 19, 20 and 21, respectively) also show this condition of substantial racial and ethnic imbalance in the district's schools.

Carter,[38] Dr. Hector Garcia,[39] and Mr. Paul Montemayor[40]

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38. Dr. Carter, a Professor of Education and Sociology at the University of Texas at El Paso, has studied extensively the problems of the Mexican-Americans in this country, particularly in Texas, California and the other Southwestern states. His testimony and the court's Exhibit 1 (a vita on Dr. Carter) indicate that among other things, Dr. Carter has published numerous reports and articles on these problems and has published a text entitled *Mexican Americans in School: A History of Educational Neglect*, which has been offered and admitted into evidence. The court found Dr. Carter to be a very credible witness, eminently well qualified to testify upon the issues raised in this lawsuit relating to whether or not the Mexican-Americans are, and have been historically, discriminated against and segregated in society generally and its schools, and if so, what benefits, if any, can be achieved by integrating the Mexican-American with the district's dominant culture.

Dr. Carter testified during the trial of this case that there exists a history of discrimination against Mexican-Americans. He stated that "particularly in Texas, it has been established that many laws were discriminatory against Mexican-Americans." Tr. p. 52. He added:

> "in a number of places in the Southwest, in the past, certain facilities—in the past, and I'm speaking of now—were not open to Mexican-Americans. There are such signs as 'Mexicans and Niggers Stay Out'. And also, 'Mexicans and Dogs not Allowed in Restaurants, Barber Shops', so forth. Clear indication in the past of discrimination against Mexican-Americans because of their race or their ethnic group.
>
> This blatant form of discrimination is rapidly disappearing. We are moving into a period of very subtle kinds of discrimination. If you go to the Fair Employment Opportunity Commission and look at the records [there are,] [y]ou will find that the Equal Employment Opportunity Commission hearings are of job discrimination against the Mexican-American. There are remnants of this discrimination still around. If you look at the school situation, obviously there is some kind of discrimination there in many, many ways. I am not speaking of Corpus Christi, I'm speaking generally here.
>
> You get another factor that is called institutional racism where the mechanism that an employer uses inadvertently or blatantly discriminates against the Mexican-American or any other minority. These are any number of items. On testing, for example, Civil Service is perhaps one of the most to be blamed for still maintaining some of these tests that preclude advancement or selection for minorities, and particularly from Mexican-Americans because of a language difference."

39. The evidence shows that Dr. Hector Garcia, a long-time resident of Corpus Christi, Texas, engaged there in the general practice of medicine since about 1946, has been deeply involved in the problems of the community, and especially in the problems of the Mexican-Americans in the area. Dr. Garcia testified that in addition to having served as an alternate delegate with the rank of Ambassador at the United Nations in New York on behalf of the United States of America, he has served as a Commission Member of the United States Commission on Civil Rights, he has been a member of the Bishop's Committee for the Spanish People (formed by area Regional Bishops of the Catholic Church to seek solutions to the problems affecting Spanish speaking people in the area), he founded the American GI Forum (which is concerned primarily with the problems of Mexican-Americans), and has participated in numerous other committees and meetings concerned with the specific problems of the Mexican-American at all levels in Corpus Christi and throughout the state. The court was most impressed with the sincerity of this witness and, of course, he possesses impeccable qualifications for testifying on the question of whether the Mexican-Americans have been historically discriminated against.

Dr. Garcia testified that Mexican-Americans have always been treated, and are being treated, as a separate group or classification apart from other whites or Caucasions in Corpus Christi and in the surrounding area.

He stated that although Mexican-Americans have held public offices in Corpus Christi, "never by any stretch of the imagination [have they done so] in proportion to their representation, either as scholastic students or by inhabitants in this area." Tr. p. 351. He stated that there has never been a Mexican-American Mayor in Corpus Christi, and that prior to the late 50's or early 60's when Mr. Manuel Maldonado was elected as a City Councilman, there had never been any Mexican-Americans elected to the City Council. In this connection, he stated:

> We tried real hard, but we could never achieve success. We were batted down. We were just held down by massive resistance from the controlling factor.

He stated that, except from about 1950 to 1960 when there were two, there has never been more than one Mexican-American on the Corpus Christi Independent School Board.

He further stated that Mexican-Americans were classified separately by the Corpus Christi Police Department and the Department of Public Safety in the area until the latter or middle part of the 1960's —that on traffic summons where a space was provided for race it would be noted whether the person was Latin-American or Mexican.

Footnote 39—Continued

He stated that it has been the practice of the Department of Public Welfare to classify Spanish-surnamed persons as Latins.

Dr. Garcia gave the following testimony with respect to past practices at Memorial Hospital in Corpus Christi, Texas:

Q. Doctor, you are a medical doctor. I will ask you if there has ever been in Corpus Christi any distinction made as far as Mexican-Americans are concerned as between Mexican-Americans and Anglos in either hospital records, health records, or in the treatment of people of Mexican decent in the hospitals in Corpus Christi?

A. Definitely there has been. There was always a separate division or classification of the Mexican American and the rest of the patients at the Memorial Hospital, which is the City-County Hospital, and until as late, I would say, as the latter part of '67 or the beginning of 1968. We are classified and treated as a separate class or group. We were divided. The records indicated it and some birth certificates have indicated it.

I have had some beginning in '48, '49 and '50—I have some bad experiences involving some serious separation or denial of beds to Mexican American patients because although there were beds available at that time in the so-called Anglo wards, because the Mexican ward would have been filled up, these patients were placed out in the hallway and this was to me a terrible experience.

In 1949 I brought it to the attention of the fact you have an empty bed in the so-called Anglo ward. Then of course the policy was simply that they were not going to put no Mexicans with the Anglos. Then of course it persisted, the division in records and classifications on admissions were always white for the Anglos and, of course, Mexican Americans or Latins for the Mexican Americans.

As early as 1965 a memorandum was circulated there by the administrator of Memorial Hospital that no Spanish shall be spoken unless it directly involved whoever was speaking. This I brought before the Board of Directors of the hospital.

We constantly brought this thing up, but of course, the most shocking experience was the fact that at that time when I came out of the service, which I had served also as a doctor, that I come and face this thing in a hospital in Corpus Christi.

I have here some statements as early as '58 wherein the Spanish surname persons—and this was involving a child seven months old, was classified as a Mexican and all the way up through, as I say, in 1959, the same thing, until the latter part of '67 or '68.

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Footnote 39—Continued

I notice here in the records again where the Anglo patient was classified as race, white, and we have here some emergency room slips that more or less would show the same thing.

Q. Doctor, let me ask you this: You did mention at one time there were actually separate facilities in the Memorial Hospital, which was a County facility, for Mexicans and Anglos.

A. In 1946 on up when I started practicing here in Corpus Christi, Memorial Hospital had separate wards, surgical and maternity. I can't recall pediatrics. But certainly the maternity sections were divided.

When asked if he knew whether or not there was a general practice in the City of Corpus Christi to a large extent to restrict Mexican-Americans from living in particular areas, Dr. Garcia testified as follows:

I would say that very certainly the restrictions that have been put in black and white, the written words, does not carry the whole intent and purposes of trying to discourage and prevent Mexicans and other minority group members from living in the area. It is also the spoken word, the attitude. I had a very good friend of mine who in 1964, a schoolteacher, was denied by all kinds of methods and means and ways of trying to buy a home in the Glen Arbor Subdivision at that time, and we had excuses that at first the FHA would not accept a loan from a Mexican American in that division or subdivision.

We had affidavits here that even a woman who was part Mexican who is married to an Anglo man who is a total Anglo would be refused houses.

We went into the real estate, we went into the housing, we went into cafes, we went everywhere, but the fact the restrictions, they were there, because where the word "Caucasian" was spelled out in writing, it did not include us.

Then later on, even if it were not put into effect by the fact they couldn't pass the examination or the payments or the FHA would object to them, some neighbors also called them—"Don't you know those people are Mexicans?"

It was the general intent and purpose that Mexicans would not be permitted to live in the more exclusive districts at that time in early 1964, to move in those areas.

He further stated that through the years he has received numerous complaints from various people who have been prevented from not only buying homes, but even from renting homes in particular areas of Corpus Christi because they were Mexican-American. He also testified that the Corpus Christi Independent School District has

is substantially correct. Not only do I find that Mexican-Americans have been discriminated against as a class, I further find that because they are an identifiable, ethnic-

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Footnote 39—Continued

historically hired a disproportionate number of Anglo-American principals, teachers, and other employees. See, footnote 57, *infra*, for the numbers of such employees in 1965-1966 in various capacities, as indicated by plaintiffs' Exhibit 21, which was prepared by Dr. Garcia and about which he testified during the trial.

40. Mr. Apoloneo Montemayor, a Mexican-American who has resided in Corpus Christi since 1924 with the exception of the period during W.W. II, testified as to how he and other Mexican-Americans have been discriminated against in Corpus Christi during his life-time. He stated that when he was in grade school that, although he lived on 10th and Mary Street, he had to walk past George Evans School, an all Anglo-American school, to Cheston Heathe School, a Mexican-American school. He stated that at that time, other than the inconvenience of having to walk farther, he did not realize as he did when he grew up that the fact that he could not go to school with his neighbors would be a difference which would always be there. Mr. Montemayor also related that when he went to work for the American Smelting & Refining Corporation in 1941, Mexican-Americans were only hired as laborers in the production department and were excluded from employment with the maintenance, electrical, crafts and power house departments where only Anglo-Americans were employed. He stated that this practice continued until 1953. But now, he stated, 65% of the 1st class jobs in maintenance are filled by Mexicans and the number of blacks has been increased. He also testified that the Mexican-Americans used to be severely segregated, residentially:

> Back when I lived on 10th Street & Staples, Agnes, Mary Street, and South—that is where the Anglos lived—Mary Street North is where the Mexicanos live. Marion Staples Northwest was for the Mexicanos and no Mexicanos lived otherwise.

Tr. p. 211-12. He stated that there has always been strong resistance to any attempt on the part of a Mexican-American to buy homes in Anglo-American neighborhoods. He further testified that the Mexican-Americans in Corpus Christi have been substantially excluded from organizations such as the Rotary Club and the Chamber of Commerce. Finally, Mr. Montemayor testified that MAYO (Mexican-American Youth Organization) was formed to lessen the discriminatory treatment the young Mexican-Americans are receiving in jobs and education.

minority[41] they are more susceptible to discrimination and this is not common to Mexican-Americans and Negroes alone, but it appears from history that any identifiable, minority[42] group (that is, different persons, whether it be racial ethnic, religious, or national origin) may quite often suffer from this problem. It seems to this court that the Mexican-American organizations, such as LULAC and the G.I. Forum, and now MAYO, were called into being in response to this problem.[43] This is why, perhaps, we are having so many studies, so many hearings, so many government commissions studying these problems,[44] and so many publications and books being published concerning this very real problem.[45] Fortunately, the objective manifestations of this type of discrimination are gradually disappearing from our society. Nevertheless, this historical pattern of discrimination has contributed to the present substantial segregation of Mexican-Americans in our schools. This segregation has resulted in a dual school system.

The court also finds that the Negro students in the Corpus Christi Independent School District are also segre-

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41. See footnote 27, *supra.*

42. *Id.*

43. The young Mexican-Americans have recently begun to call themselves Chicanoes, and their movement, La Roza. During the pendency of this suit, these Chicanoes have been trying to get La Roza on the Texas ballot as La Roza Unida Party.

44. See footnote 34, *supra.*

45. See the bibliography to *Mexican-Americans in School: A History of Educational Neglect,* by Dr. Thomas Carter (College Entrance Examination Board, New York: 1970).

gated to a degree prohibited by law which causes this to be a dual rather than a unitary school system.[46]

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46. Defendants' Exhibit 4, reproduced in footnote 36, *supra*, indicates that during the 1969-70 school year, approximately 5.73% of the elementary students, 5.25% of the junior high students, and 4.66% of the senior high students were Negro. As the court mentioned in footnote 37, *supra*, 50.78% of the elementary students, 46.71% of the junior high students, and 38.87% of the high school students were Mexican-American during the 1969-70 school year. Thus, if the district's Negro and Mexican-American students had been uniformly integrated with the Anglo-American student population, each elementary school would have had approximately 43% Anglo-American students in each elementary school, 48% in each junior high school and 56% in senior high school. Few schools had enrollments anything close to these figures. Most of the district's Negro students attended schools that were all black, or overwhelmingly Mexican-American. Defendants' Exhibit 4 in footnote 40, showing the percentage of Negro students enrolled in each school in 1969-1970, indicates the following:

1. As to elementary students:

a. 825 of the 1,398 Negro elementary students in the district attended either Crosley or Washington elementary school. Thus, approximately 60% of the Negro elementary children in the district were concentrated in only 2 of the district's 45 elementary schools;

b. Washington elementary school had a 100% Negro enrollment;

c. 473 other Negro elementary children attended Allen, Crockett, Evans, Furman, Garcia, Lamar, Los Encinas, Lozano, Prescott, Shaw, Southgate and Travis, and in each of these schools the Mexican-American enrollment ranged from 70% to in excess of 90% of the total enrollment.

d. In Calk, Fisher, Fraser, Gibson, Meadowbrook, Montclair, Parkdale, Sanders, Schanen, Smith, Wilson, Windsor Park, Woodlawn and Yeager elementary schools, the percentage of Anglo-American children exceeded 70% of each school's total enrollment.

2. As to the 12 junior high schools, the percentage of Negro and Mexican-American students enrolled in Barnes, Cunningham and Wynn Seal exceeded 75% of each school's total enrollment. And in Baker, Brown, Cullen, Haas, Hamlin and Sundeed junior high schools, the percentage of Anglo-American students exceeded 75% of each school's total enrollment. Nine of the twelve junior high schools are readily identifiable as a segregated Anglo-American or non-Anglo-American school.

3. Each of the senior high schools had enrolled either 75% or more Anglo-American students or 75% or more non-Anglo-Americans.

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The court's finding that the Mexican-American and Negro students are substantially segregated from the remaining student population of this district is based primarily upon the undisputed statistical evidence. This is also, and I so find, true of the faculty.[47]

[7] The court is of the opinion that by placing Negroes and Mexican-Americans in the same school does not achieve a unitary system as contemplated by law. A unitary school district can be achieved here only by substantial integration of the Negroes and Mexican-Americans with the remaining student population of the district.[48]

As to whether or not the desegregation which has resulted in this dual system is de facto or de jure, the court is of the opinion that some of the segregation was of de facto nature because of the socio-economic factors which caused Negroes and Mexican-Americans to live in the

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Each was readily identifiable as either a segregated Anglo-American school or non-Anglo-American school.

It is manifestly clear from the evidence that the Negro students within the Corpus Christi Independent School District have historically been substantially segregated in the schools from the district's Anglo-American students.

The court's statement in text that the ethnic imbalance in the district's schools constitutes constitutionally impermissible segregation as to the Negro students attending the district's schools is not based solely on the fact that such segregation exists, but also upon additional considerations relating to the causes of such condition, all of which are set forth in text and accompanying footnotes following the textual statement to which this footnote relates.

47. See footnote 56 and accompanying text, *infra*.

48. The constitutional inquiry is concerned with whether a particular disadvantaged group is being substantially segregated from the more advantaged group; the constitutional ill is not cured simply by comingling two similarly disadvantaged groups (the Negroes and the Mexican-Americans), both of which are substantially segregated from the more advantaged group, which in this case is the Anglo-American population. See generally, footnote 27, *supra*.

"corridor" (which we have described here as where they live, and which is similar to the ghettos of other cities), and because of the pattern of the geographic and demographic expansion of the city towards the south and southwest.[49]

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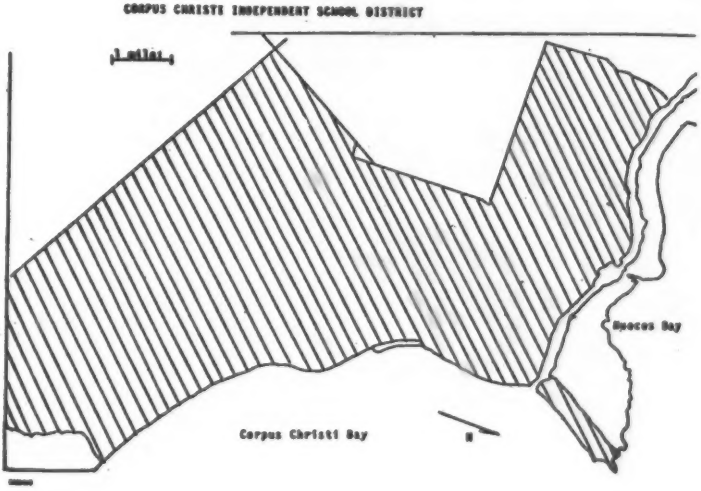
49. The Corpus Christi Independent School District, encompassing most of the City of Corpus Christi, Texas, is of an elongated, crescent shape, as it has followed the city's expansion to the South and Southeast along the curvature of Corpus Christi Bay. The hatch marks on the map reproduced here indicate the general size, location and configuration of the district.



The district's Negro and Mexican-American population is highly concentrated within a fairly narrow band located in what is generally the middle part of the district where its width narrows. This Negro and Mexican-American "corridor", as it has been referred to during the trial of this case, runs from the Northeast corner of the district in a generally South-westerly direction across the district, as indicated, and varies in width, where the Negro and Mexican-American density is very high, from about one to three miles. The relative number of

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[8] But this segregated and dual school district has its real roots in the minds of men; that is, the failure of the school system to anticipate and correct the imbalancing that was developing. The court is of the firm opinion that administrative decisions by the school board in drawing boundaries,[50] locating,

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Footnote 49—Continued

Negro and Mexican-Americans, as opposed to Anglo-Americans, in neighborhoods to the South and Southeast of this "corridor" quite rapidly and very dismatically decreases the farther to the South or Southeast from the "corridor" the neighborhood is located. Relatively few Negroes and Mexican-Americans reside in the more affluent South and Southeast parts of the district. These areas are predominantly Anglo-American. Thus, residentially, the district is imbalanced with respect to its Anglo-American, Mexican-American, and Negro residents.

The school district's authorities have followed a neighborhood school policy under which students have been, and are, assigned to schools near their homes by use of geographic attendance zone lines. This superimposing a neighborhood school plan in this district which has such a marked pattern of residential segregation, has, inevitably, resulted in the Negro and Mexican-American also being substantially segregated in the schools. See footnotes 37 and 46, supra.

50. There is one especially noticeable example. Plaintiffs' Exhibit 32, a map of Corpus Christi, shows the existing senior high school boundaries as they existed in 1967 together with the new boundary lines which were effective upon the opening of Moody High School. The exhibit shows that students residing in the corridor were divided between Carroll, Miller and Ray prior to the establishment of Moody. The boundary lines as established by the school board walled in Negro and Mexican-American children in the Moody High School zone and withdrew significant numbers of both groups from Carroll, Ray and Miller. These boundaries diminished the degree of integration of these Negro and Mexican-American children with Anglo-American children which existed prior to this time.

Before 1961, the district's Washington and Hirsch elementary schools served the same geographic area, near the Northeast corner of the district. The limited freedom of choice policy allowed Negro students in the area to attend Hirsch. When Hirsch was closed in 1961, the boundary lines were drawn in such a way that Anglo and Mexican-American children who formerly attended Hirsch were assigned to Beach Elementary school, which was much farther from

new schools, building new schools and renovating old schools in the predominantly Negro and Mexican parts of town,[51] in providing an elastic and flexible

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their homes than Washington. This action caused Washington to become more segregated.

Defendants' Exhibit 2 (see footnote 14, supra), shows that the boundaries for the newly constructed Sterling Martin, Jr. High School do not cross Ayers Street on the South. The effect of this boundary limitation increases the segregation of the Negro and Mexican-American students for the evidence has shown Ayers Street to be a "quasi-border" on the southern side of the "corridor," there being a much higher percentage of Anglo-Americans residing to the South of Ayers than to the North.

The evidence very clearly shows that the school board, in establishing, altering or changing school boundaries never considered promotion of integration as between the Negroes and Mexican-Americans with the Anglo-Americans as a factor in such boundary establishment or change.

51. The following is a list of the schools the district built since 1960, along with the approximate percentage of each ethnic group's student enrollment in 1969-1970:

School	Negro	Mex.-Amer.	Anglo-Amer.
King Sr. H.	.24	9.23	90.53
Moody Sr. H.	10.57	85.78	3.65
Cullen Place Jr. H.	—0—	6.18	93.82
Tom Browne Jr. H.	—0—	8.68	91.32
Haas Jr. H.	—0—	10.99	88.66
Martin Jr. H.*			
Garcia Elem.	27.81	72.19	—0—
Los Encinas Elem.	12.46	74.47	13.07
Meadow Brook Elem.	—0—	8.46	91.37
Schannen Est. Elem.	—0—	3.28	96.55
Smith Elem.	1.03	12.66	86.31
Yeager Elem.	—0—	6.70	93.30

* Since this school was not scheduled to open until the Fall of 1970, no enrollment figures were available. However, the school site lies in an area with a very high concentration of Mexican-Americans.

As the figures reflect, the Negro and Mexican-American students either represent a very high or a very low percentage of the total

subjective transfer system that resulted in some Anglo children being allowed to avoid the ghetto, or "corridor" schools,[52] by bussing some students,[53] by

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enrollment in each of the schools listed above. The schools are extremely imbalanced, ethnically.

The following schools have had major renovations and/or additions made since 1960. The percentage of each ethnic group's 1969-70 enrollment is also listed:

School	Negro %	M-Amer. %	Anglo-Amer. %
Miller H.	13.70	65.61	20.69
Solomon Coles Jr. H.	36.95	57.97	5.08
Wynn Seale Jr. H.	.75	92.07	7.18
Crockett Elem.	6.39	90.69	2.92
Evans Elem.	6.48	93.06	0.46
Kostoryz Elem.	—0—	36.14	63.59

With the exception of Kostoryz Elementary School, the above figures show that the combined percentages of enrollment of the Negro and Mexican-American students represent a disproportionately high or low percent of the total enrollment in each school.

Promoting integration of the Negro and Mexican-American students with the Anglo-American students clearly was not considered by the district's school board as a factor in its decisions as to where new schools were to be located, the size the new schools should be, or whether old schools should be renovated or enlarged. The district did not consider, and consequently did not pursue, viable alternate locations for schools which, even using a form of neighborhood school plan, would have resulted in a much more favorable ethnic and racial balance.

52. Plaintiffs' Exhibits 26(1) and 26(106) consist of some 200 or so "Student Emergency Transfer Applications" that have been submitted on behalf of students in the district. Each application has a short statement and the reason for transfer and an indication of the action taken by the school authorities. These exhibits show that the district's treatment of such applications has been sufficiently elastic to allow Anglo-American students to escape corridor schools. For example, it has been far more difficult for Mexican-American children to transfer from schools with high percentage of Negroes and Mexican-Americans enrolled to schools with low percentages of Negroes and Mexican-Americans than it has been for Anglo-American children. The exhibits also show that it has been easier for Mexican-American children to transfer to schools with higher percentages of Negroes and Mexican-Americans than to transfer to schools with lower percentages of Negroes and Mexican-Americans. The obvious effect has been to diminish whatever integrative effect the district's attendant zones would have otherwise achieved.

providing one or more optional transfer zones which resulted in Anglos being able to avoid Negro and Mexican-American schools, not allowing Mexican-Americans or Negroes the option of going to Anglo schools,[54] by spending extraordinarily large sums of money which resulted in intensifying and perpetuating a segregated, dual school system,[55] by assigning Negro and Mexican-American teachers in disparate

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53. For example, when the district closed Hirsch Elementary School in 1961, the boundary lines were drawn so that Anglo and Mexican-American children who formerly attended Hirsch were assigned to Beach Elementary, which was much farther from their homes than Washington. These children had to be bussed on a freeway over the Navigation Channel to reach Beach Elementary School. This action caused the enrollment of Washington Elementary to be almost entirely Negro.

54. The district established an option zone to the southern portion of the Menger zone, granting Junior high school students residing within this area the option of attending either Wynn Seale Junior High School, which has an overwhelmingly large percentage of Mexican-American students, or Baker Junior High School, which has only a small Mexican-American Negro enrollment. The students residing within the option zone are predominantly Anglo-Americans. Although the purpose for establishing this option zone was to utilize idle capacity at Baker, the option was never granted to other areas, just as close to Baker as the optional zone selected, but which had, unlike the population of the option zone selected, high densities of Mexican-American junior high school students. Obviously the promotion of integration of the Negro and Mexican-American students with the Anglo-American students was not considered by the school board in the establishment and selection of the optional transfer zone.

55. Plaintiffs' exhibits 11 and 13 show that rather than build new schools in locations which would encompass areas more racially and ethnically balanced, large sums of money were expended in enlarging facilities at existing sites located in the midst of highly segregated neighborhoods. See footnote 51, *supra*. This is also shown by plaintiffs' Exhibit 36 (described in footnote 12, *supra*). The board did not consider the promotion of integration of the Negroes and Mexican-Americans with the Anglo-Americans in the construction of school facilities.

ratios to these segregated schools,[56] and further failing to employ a sufficient number of Negro and Mexican-American school teachers,[57] and failing to pro-

56. See defendants' Exhibit 4, reproduced in footnote 37, *supra*, and compare in this exhibit the number of Negro and Mexican-American teachers assigned in the 1969-70 school year to the schools where the percentage of Negro and Mexican-American student enrollment is disproportionately high with the number of such teachers where the percentage of Negro and Mexican-American student enrollment is disproportionately low. Plaintiffs' Exhibit 17 shows the same pattern as to Negro teacher assignments for years 1960 through 1968. Plaintiffs' Exhibit 3-B and defendants' Exhibit 5 show that this pattern existed in 1968-69 as to both Negro and Mexican-American teachers. Promoting integration of the schools—through the assignment of teachers of each group (Negro, Mexican-American and Anglo-American) to each school in the district so that the relative percent of each group assigned to each school would reflect the district's cumulative percentages—was not a consideration in the school board's assignment of teachers.

57. Page 2 of the defendants' Exhibit 9 (described in footnote 22, *supra*) shows that the number and percent of the total number of Anglo-American, Negro and Mexican-American teachers employed in 1955-56, 1965-66 and 1969-70, were as follows:

Teachers	1955-56		1965-66		1969-70	
Anglo-American	1,037	90.6%	1,527	86.1%	1,519	79.6%
Mexican-American	56	4.9%	201	11.3%	330	17.3%
Negro	52	4.5%	46	2.6%	60	3.1%
Total	1,145		1,774		1,909	

See also, defendants' Exhibit 4, reproduced in footnote 37, *supra*.

The district has also historically hired a disproportionately small number of Negro and Mexican-American professional personnel, for positions on the Central Staff, as principals, counselors and other specialists, other than regular classroom teachers. Defendants' Exhibit 9 shows that in the school year 1955-1956 there was only 1 Mexican-American, 5 Negroes so employed, as opposed to 115 Anglo-Americans so employed. The exhibit shows that for school year 1969-1970, the district had so employed 38 Mexican-Americans, 4 Negroes, and 223 Anglo-Americans.

Plaintiffs' Exhibit 21, containing statistics concerning the number of Mexican-Americans employed by the district in various capacities during the 1965-1966 school year, shows the following for that year:

1. There were no Mexican-Americans employed in top administrative positions;

vide a majority-to-minority transfer rule, were, regardless of all explanations and regardless of all expressions of good intentions, calculated to, and did, maintain and promote a dual school system. Therefore this court finds as a matter of fact and law that the Corpus Christi Independent School District is a de jure segregated school system.[58]

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2. No Mexican-Americans were employed as head of assistants, divisions of personnel, research or pupil services;

3. Only 2 Mexican-Americans were employed as consultants out of a total of 14;

4. Only one Mexican-American nurse was employed out of 15 school nurses;

5. Out of 55 school cafeteria managers, only 5 Mexican-Americans were employed;

6. No Mexican-Americans were employed out of 36 high school administrative officers;

7. Only 4 Mexican-Americans were employed out of a total of 52 junior high school administrative officers; and

8. Only 3 Mexican-American principals were employed out of a total of 39 elementary school principals.

58. Wholly so with respect to the district's Mexican-Americans and predominantly so with respect to the district's Negroes, the de jure nature of the existing pattern of segregation within the Corpus Christi Independent School District has as its basis state action of a non-statutory variety—that is, the school board's active pursuit of policies that not only do nothing to counteract the effects of existing patterns of residential segregation in view of viable alternatives of significant integrative value, but, in fact, increase and exacerbate the district's racial and ethnic imbalance. There has been a history of official school board acts which have had such a segregative effect. See footnotes 50 through 57 and accompanying text, *supra*. The educational values of the school board's policies do not outweigh the integrative value of policies it either ignored or rejected. Absent such justification, the imbalance cannot withstand constitutional scrutiny under the Fourteenth Amendment's equal educational opportunity guarantee.

The quality or quantum of segregative acts sufficient to satisfy the requirements of state action of the sort condemned by Brown v. Bd. of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), and subsequent cases, are of course indeterminate. Many courts have held that the requisite state action is absent when a board merely fails to correct imbalance. *E.g.*, Bell v. School City, 213 F.Supp. 819

The defendants have attempted to show that the Negroes and Mexican-Americans are spread throughout the city. To whatever extent this is true, nevertheless,

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(N.D. Ind.), affirmed, 324 F.2d 209 (7th Cir. 1963), cert. den., 377 U.S. 924, 84 S.Ct. 1223, 12 L.Ed.2d 216 (1964). This line of cases does not require a school board to alter a neighborhood school attendance plan to counteract true de facto segregation. See, *e.g.*, Moses v. Washington Parish Sch. Bd., 276 F.Supp. 834, 840 (E.D. La. 1967). Because the Supreme Court has not ruled otherwise, the Supreme Court's narrow holding in *Brown* has often been an insurmountable barrier to those seeking judicial relief from segregation resulting from the super-imposition of a neighborhood school plan upon a pattern of residential segregation. *E.g.*, Swann v. Charlotte-Mecklenburg Bd. of Education, 369 F.2d 29 (4th Cir. (1966); Webb v. Bd. of Education of Chicago, 223 F.Supp. 466 (N.D. Ill. 1963). Yet school boards, in the exercise of their administrative discretion in determining school sites, school sizes and capacities, the location of attendance zone lines, etc., can, and often do, have an overwhelming impact upon the degree of racial and ethnic mixing that is achieved in the schools. Recognizing the pervasive influence that school boards can have in this area, other courts have broadened the concept of "unlawfully segregative state action" to include the improper exercise by a school board (as agent of the State and of its political subdivisions) of its administrative discretion in connection with the implementation, operation or manipulation of a neighborhood school plan. When such "state action" creates or perpetuates racial or ethnic imbalance, it may be in violation of equal protection.

In Taylor v. Bd. of Educ. of New Rochelle, 191 F.Supp. 181 (S.D.N.Y.), reh., 195 F.Supp. 231, aff'd 294 F.2d 36 (2d Cir.), cert. den. 368 U.S. 940, 82 S.Ct. 382, 7 L.Ed.2d 339 (1961), the court, declaring that de jure segregation should include all "segregation created or maintained by official act, regardless of its form" (191 F.Supp. at 194, n. 12), found the segregation in question to be of a de jure nature because (1) the board had gerrymandered attendance zones which effectively segregated the schools, and (2) the board, ignoring the advice of psychologists, sociologists, educators and state officials had made no changes to improve the balance in the schools. This case suggests that de facto segregation may take on overtones of de jure segregation not only when a school board causes segregation by intentional, affirmative acts, but also when it fails to adopt viable alternatives of integrative value. See also, Keyes v. School Dist. of Denver, *supra* note 31.

The case of Hobson v. Hansen, 269 F.Supp. 401 (D.D.C. 1967), aff'd, Smuck v. Hobson, 132 U.S. App. D.C. 372, 408 F.2d 175 (1969), involved a neighborhood school plan in the District of Co-

the undisputed statistics show that the Negroes and Mexican-Americans are substantially segregated in the school system.[59] So this would mean that the schoolhouses are more segregated than the neighborhoods.

The defendants argued that they did not have the benefit of hindsight, which we all appreciate, but this court feels that there were sufficient warnings given to the school board by interested citizens and groups to alert them to this problem, which any school board member or superintendent should know might be a problem in this day and age.[60]

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lumbia which predictably had resulted in severe imbalance in the schools there. The court ruled that segregation created by such a plan must be supported by "compelling or adequate justification." 269 F.Supp. at 508. The court found that the administrative and cost considerations urged in that case were not sufficient justification in view of the comparative value of integration.

One line of cases has followed a theory that a school board, aware of residential patterns of segregation within its district, assumes the discriminatory posture of homeowners by locating schools in the middle of, and drawing neighborhood school attendance lines around segregated neighborhoods. See, *e.g.*, Brewer v. School Bd. of Norfolk, 397 F.2d 37 (4th Cir. 1968); United States by Clark v. Bertie County Bd. of Educ., 293 F.Supp. 1276 (E.D.N.C.) (requiring the board to redraw attendance zones in such a manner as to counteract the effects of residential segregation); Barksdale v. Springfield School Commission, 237 F.Supp. 543 (D.Mass.), vacated on other grounds, 348 F.2d 261 (1st Cir. 1965); Blocker v. Bd. of Education of Manhasset, 226 F.Supp. 208 (E.D.N.Y. 1964).

Whatever rationale is adopted, there very clearly exists a trend away from the position that mere failure to correct imbalance does not constitute state action. The fact that a school board has not pursued, as in this case, more effective measures, reasonable in terms of cost and administrative considerations, is probably enough to cause imbalances thus created to be de jure in contravention of the *Brown* rationale. But certainly where, as here, a neighborhood school plan has been implemented and operated in such a way as to increase the imbalances, a program of de jure segregation exists.

59. See, defendants' Exhibit 4, reproduced in footnote 38, *supra*.

60. Dr. Garcia testified that beginning in the latter part of 1948 and 1949 and periodically thereafter, he and others have met with

This court is not here to place blame, criticize, or find fault, but this suit was brought to this court by the

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the superintendents of the district to object to the fact that the district had a disproportionately low number of Mexican-American principals and teachers and to urge that the district take action to correct this imbalance in the faculty and staff. Dr. Garcia presented a paper (plaintiffs' Exhibit 21, summarized in footnote 50, *supra*) at a hearing on the Texas Advisory Committee of the United States Commission on Civil Rights during which he stated the number of Mexican-American teachers, principals, administrative and other staff personnel, etc., employed by the district in school year 1965-66 in comparison to the total number of teachers, etc., employed at that time.

In a letter dated August 18, 1967 to the Chairman of the Board of Trustees of the Corpus Christi Independent School District from the Chairman of the Human Relations Committee of the City of Corpus Christi (plaintiffs' Exhibit 37), the school board chairman was urged to immediately consider establishing better communications between the school administration, school board and the communities to be served in order to deal more effectively with, and not continue to ignore, race and ethnic problems, and to consider changing boundaries of various schools in order to achieve a better mix between the Mexican-American and Negro students with the Anglo-American students.

Plaintiffs' Exhibit 37-A, entitled "Report of the Special Sub-Committee of the Human Relations Committee Investigating Charges of De Facto Segregation at Moody High School and a Myriad of Complaints in Reference to Cunningham and Prescott Schools," and dated August 16, 1967, summarizes the committee's questions presented to the district's administration concerning, among other matters, the possibility of taking various actions (*e. g.*, redraw boundary lines) to alleviate the existing patterns of segregation of the Negro and Mexican-American students from the Anglo-American students. A summary of the school administrations answers are also stated in the report. Plaintiffs' Exhibit 37 indicates that a copy of the report was sent to the Chairman of the Board of Trustees of the district on August 18, 1967.

In plaintiffs' Exhibit 38, a letter to the president of the school board from the president of the NAACP, dated March 27, 1968, a complaint was made concerning certain segregative practices, including gerrymandering attendance areas, and requested that the matters be discussed at the earliest possible date.

The chairman of the Human Relations Committee wrote the district's superintendent on May 14, 1968 (plaintiffs' Exhibit 39), again asking that action be taken to end discriminatory practices in the district's schools.

plaintiffs alleging a denial of rights protected by the Fourteenth Amendment, and it is this court's duty to adjudicate these grievances. The courts do not go out and look for these controversial problems to solve; they are brought to the courthouse by human beings with a grievance, and that is where they should be brought.

This court knows that Board members change from time to time; this court knows that in our complex society of today of large institutions that we do have problems of personal responsibility or of collective responsibility, individual fault or coporate fault, private blame or institutional blame. The problem of moral man and immoral society, as Niebuhr puts it,[61] is still with us. But whatever were the personal and individual intentions of the school board members, who I noted did not testify in

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A letter dated October 21, 1968, to the superintendent of the district from the Education Branch Chief, Office for Civil Rights, Department of Health, Education and Welfare (plaintiffs' Exhibit 31), advised the superintendent that 83% of the Mexican-American and Negro children in the district were attending identifiable minority group schools and suggested that to help to cure this problem the school board should redraw boundary lines and adopt a "majority-to-minority" transfer rule. The letter also stated that while the district had made progress toward eliminating discriminatory practices in hiring and assigning faculty and administrative personnel, this process had not been completed. The letter also stated that school sites had been selected with the effect of perpetuating identifiable minority group schools (giving examples), boundary lines had been drawn with the effect of perpetuating minority group schools (giving examples), and that schools in Mexican-American areas were more crowded than schools in Anglo areas, and more schools in the Mexican-American areas were utilizing portable classrooms (giving specific examples) all of which, the letter states, had the effect of segregating the Mexican-American students. In summary, the letter concluded that the school board had been much more responsive to the needs and desires of the Anglo community than to those of the Mexican-American and Negro residents.

61. *Moral Man and Immoral Society* by Reinhold Neibuhr (Charles Scribner's Sons: New York, 1960).

this case, the board had the ultimate responsibility,[62] and I find that the board of trustees of the Corpus Christi Independent School District has not discharged its heavy burden[63] to explain its preference for what this court finds is a segregated and dual school system. I cannot and do not accept the explanations given by the school administration for not only maintaining a segregated school system and dual school system, but really what appears to me to be a program which will intensify and magnify the problem as time goes on. This court is of the opinion that there are reasonable available methods to effect a unitary system, and this court finds that this dual system can be disestablished without significant administrative, educational, economic, or transportation costs. And I appreciated the plaintiffs bringing to the court's attention that they are not here asking for a large number of children to be bussed, and neither is the court.

[9] It is obvious that the faculty and the administrative staff are even more segregated than the schools.[64] There is no real dispute here. The school must assign Negroes and Mexican-American teachers throughout the system on the same ratio of percentages they are in the total teacher and staff population.[65] Furthermore, the

62. Green v. County School Bd. of New Kent County, 391 U.S. 430, 439, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968); Andrews v. Monroe, 425 F.2d 1017 (5th Cir., April 23, 1970); Singleton v. Jackson Municipal Separate School Dist., 419 F.2d 1211 (5th Cir. 1970); Henry v. Clarksdale Mun. Separate School Dist., 409 F.2d 682 (5th Cir., March 6, 1969).

63. *Id.*

64. See footnote 56, *supra.*

65. Ellis v. Bd. of Public Instruction of Orange County, 423 F.2d 203 (5th Cir. 1970); Singleton v. Jackson Mun. Separate School Dist., 419 F.2d 1211, 1218 (5th Cir. 1969).

school board must immediately take steps to employ more Negro and Mexican-American teachers.

[10] And as to the dire effects the defendants claim will result if there is more transportation of students than is presently done, the courts says that the children who are being bussed now make no such claims, nor have I been shown any harmful effects on the individual children that will outweigh the harmful effects on the Negro or Mexican-American child who is in a segregated and dual system. That is my opinion after giving careful attention to all of the testimony of the experts. The physical and social inconveniences that some children might suffer will not be so severe or so prolonged when compared to the psychological and emotional trauma, and scarring, and crippling that minority[66] children suffer when they feel they are rejected and not accepted.

As to the educational benefits, this court is of the opinion that the Anglo child and the Negro and the Mexican child will benefit by a unitary system, and I think the plaintiffs' statistics[67] and study[68] show this, especially

66. See footnote 27, *supra.*

67. Plaintiffs' Exhibit 21 indicates that the median years of school completed by persons in Corpus Christi 25 years of age and over by ethnic groups were the following in 1950:

Anglo-American	Mexican-American	Negro
11.8 years	3.2 years	7.7 years

The same exhibit shows the following respective figures for 1960:

Anglo-American	Mexican-American	Negro
12.2 years	4.5 years	8 years

Table 1 at pp. 22-23, of plaintiffs' Exhibit 18 (see footnote 68, *infra*), shows the median years of school completed by Mexican-Americans and non-white persons 25 years of age and older in standard metropolitan districts in the five southwestern states as of 1950 and 1960, as follows:

25 years of age and older in standard metropolitan districts in the five southwestern states as of 1950 and 1960, as follows:

	1950 Total Population	WPSS *	1960 Total Population	Anglo	WPSS	Non-white
ARIZONA	10.0	6.0	11.2	12.1	7.0	7.0
Phoenix	10.6	5.3	11.6	12.1	6.1	8.5
Tucson	11.2	6.5	12.1	12.3	8.0	7.8
CALIFORNIA	11.6	7.8	12.1	12.2	8.6	10.6
Bakersfield	9.9	6.5	10.8	11.4	7.3	8.5
Fresno	9.8	5.6	10.4	10.7	6.1	8.8
Long Beach-Los Angeles	12.0	8.2	12.1	12.3	8.9	11.1
Sacramento	11.3	7.9	12.2	12.3	9.1	10.9
San Bernardino-Riverside Ontario	10.9	6.7	11.8	12.1	8.0	9.8
San Diego	12.0	8.1	12.1	12.2	8.9	10.7
San Francisco-Oakland	12.0	8.9	12.1	12.3	9.7	10.2
San Jose	11.4	8.1	12.2	12.4	8.3	12.0
Santa Barbara	11.8	7.0	12.2	12.4	8.3	9.9
Stockton	9.1	7.2	10.0	10.7	7.5	8.2
COLORADO	10.9	6.5	12.1	12.2	8.2	11.2
Colorado Springs	11.7	8.4	12.3	12.4	10.1	12.1
Denver	12.0	8.0	12.2	12.3	8.8	11.4
Pueblo	9.1	6.3	10.2	11.0	8.1	9.2
NEW MEXICO	9.3	6.1	11.2	12.2	7.4	7.1
Albuquerque	11.7	7.7	12.1	12.5	8.7	10.9
TEXAS	9.3	3.5	10.4	11.5	4.8	8.1
Abilene	10.1	—	11.7	12.0	4.0	8.8
Amarillo	11.3	4.7	12.1	12.2	8.1	9.5
Austin	10.9	3.5	11.7	12.3	4.4	8.6
Beaumont-Port Arthur	9.7	7.0	10.8	11.7	8.7	7.1
Brownsville-Harlingen-San Benito	6.3	2.7	7.9	12.3	3.9	9.5
Corpus Christi	9.4	3.2	10.1	12.2	4.5	8.0
Dallas	11.0	4.4	11.8	12.1	6.4	8.6
El Paso	9.2	5.2	11.1	12.4	6.6	11.7
Fort Worth	10.7	5.4	11.4	11.9	7.7	8.7
Galveston	9.4	4.9	10.3	11.3	6.9	8.3
Houston	10.4	5.2	11.4	12.1	6.4	8.8
Laredo	5.4	5.2	6.7	—	5.4	—
Lubbock	11.0	1.7	11.6	12.1	3.1	8.3
Midland	12.1	1.8	12.4	12.6	3.7	8.8
Odessa	10.4	3.9	11.4	11.8	4.6	8.8
San Angelo	10.2	2.9	10.7	11.5	4.0	8.0
San Antonio	9.1	4.5	10.0	12.1	5.7	9.4
Waco	9.4	2.9	10.3	11.0	5.5	8.2
Wichita Falls	—	—	11.4	11.7	6.3	8.7
ALL FIVE STATES	10.6	5.4	11.6	12.1	7.1	9.0

(* WPSS means White Person of Spanish Surname)

Table 3, at p. 27 of Plaintiffs' Exhibit 18 (see footnote 68, *infra*), shows estimated school dropout rates by grade level in Texas, expressed in percentage of enrollment by grade, as follows:

Grade	Anglo	Latin	Negro	Total	Cumulative
7	4.8	17.6	7.2	9.3	9.3
8	7.0	17.1	8.9	10.6	19.9
9	15.0	22.5	19.2	18.1	38.0
10	26.5	23.2	26.7	26.4	64.4
11	27.4	13.7	23.6	22.3	86.7
12	17.4	5.9	14.4	13.1	99.8
TOTAL	100.1	100.0	100.0	99.8	

EXHIBIT 18

CORPUS CHRISTI PUBLIC SCHOOLS
Corpus Christi, Texas
July 30, 1968

DROP-OUT STUDY BY ETHNIC GROUPS 1967-68

		STUDENT BODY						Drop-	DROP-OUTS						Pct. of Drop-
		Ang-Am		Mex-Am		Negro		outs	Ang-Am		Mex-Am		Negro		outs
School	Enrollment	No.	Pct.	No.	Pct.	No.	Pct.		No.	Pct.	No.	Pct.	No.	Pct.	
Carroll	1757	1359	77.35	398	22.65	0	0.00	54	40	74.07	14	25.93	0	0.00	3.07
King	1845	1688	91.49	151	8.18	6	0.33	118	109	92.37	9	7.63	0	0.00	6.40
Miller	2098	484	23.07	1392	66.35	222	10.58	200	41	20.50	136	68.00	23	11.50	9.53
Moody	1459	65	4.46	1270	87.04	124	8.50	75	7	9.33	63	84.00	5	6.67	5.14
Ray	2074	1489	71.79	583	28.11	2	0.09	100	56	56.00	44	44.00	0	0.00	4.82
Baker	1020	848	83.14	172	16.86	0	0.00	7	4	57.14	3	42.86	0	0.00	0.69
Barnes	1188	14	1.18	1142	96.13	32	2.69	37	1	2.70	36	97.30	0	0.00	3.11
Browne	1076	964	89.59	112	10.41	0	0.00	8	8	100.00	0	0.00	0	0.00	0.74
Coles	634	17	2.68	414	65.30	203	32.02	18	3	16.67	10	55.55	5	27.78	2.84
Cullen	1263	1206	95.49	57	4.51	0	0.00	2	2	100.00	0	0.00	0	0.00	0.16
Cunningham	1327	14	1.01	1200	90.43	113	8.52	22	0	0.00	20	90.90	2	9.09	1.66
Driscoll	1070	433	40.47	457	42.71	180	16.83	27	14	51.85	12	44.44	1	3.71	2.52
Hamlin	1001	947	94.61	54	5.39	0	0.00	8	6	75.00	2	25.00	0	0.00	0.79
South Park	931	451	48.44	478	51.34	2	0.21	28	9	32.14	19	67.86	0	0.00	3.00
Sundeen	1007	875	86.89	123	12.22	9	0.89	2	2	100.00	0	0.00	0	0.00	0.19
Wynn Seale	1190	134	11.26	1041	87.48	15	1.26	57	6	10.53	51	89.47	0	0.00	4.79
TOTALS	20940	10988	52.47	9044	43.19	908	4.34	763	308	40.37	419	54.91	36	4.72	3.64

on the amount of schooling Anglos and Mexican-Americans, get in duration of time.[69] Our nation is becoming polarized and fragmented, and this has the effect of radicalizing many of our young people. It is not enough today to pay lip service to the Constitution by tokenism.

While many of our institutions have a tendency to divide us—religious institutions, social institutions, economic institutions, political institutions—the public school institution, as I see it, is the one unique institution which has the capacity to unite this nation and to unite this diverse and pluralistic society that we have. We are not a homogeneous people; we are a heterogenous people; we have many races, many religions, many colors in America. Here in the public school system as young Americans, they can study, play together and interact. They will get to know one another, to respect the others' differences and

68. Plaintiffs' Exhibit 18, a book by Dr. Thomas P. Carter entitled *Mexican-Americans in School: A History of Educational Neglect,* (published in 1970 by College Entrance Examination Board, New York), consists of data concerning the kind and quality of formal education available to Mexican-Americans and the nature of local and regional social systems and how they affect the opportunities of the Mexican-American. The book, and its author, Dr. Carter, who testified at the trial, indicate that the substantial segregation and isolation of the Mexican-Americans in the schools throughout the Southwest is a cause of negativism towards school on the part of these Mexican-American children which discourages these children from succeeding in public school. See plaintiffs' Exhibit 18, pg. 65-130. The court was impressed with the testimony of Dr. Carter, who summarized the matters contained in his book, plaintiffs' Exhibit 18, and accepts the conclusions he made on this point in his book and during his oral testimony.

69. See footnote 67, *supra.*

to tolerate each other even though of a different race or color, or religious, social or ethnic status.

But be that as it may, the Supreme Court has resolved that problem for the district court by saying that separate education and educational facilities are inherently unequal and therefore unconstitutional.

Therefore the court finds for the plaintiffs and the injunctive relief prayed for will be granted.

Because the courts, especially in the South, are finding that a bi-racial or human relations committee appointed by the court can aid the school boards and the courts through these trying times, and in these complex problems of creating a unitary system and maintaining them, this court is of the opinion that a human relations committee appointed by this court will be of great help. Therefore, the plaintiffs and defendants will immediately provide the court with a list of fifteen names each of patrons of the Corpus Christi Independent School District, which list shall include the name, address, and telephone number of each person, and each list shall include five Negroes, five Anglos, and five Mexican-Americans. The court will choose from this list two names from each of the five names submitted, which will provide the court with a committee of twelve persons—four of which will be Anglo, four will be Negro, and four will be Mexican-American. The court will charge this twelve member human relations committee with the responsibility of investigating, consulting and advising with the school board, periodically, with respect to all matters tending to promote and to maintain the operation of a unitary school system which will satisfy the law.

[11] Because this opinion and partial final judgment involves a controlling question of law as to which there is substantial ground for differences of opinion—insofar as this court is of the opinion that Mexican-Americans are an identifiable ethnic class who have suffered de jure and de facto segregation, who are protected as a class under the Fourteenth Amendment and the laws of the United States, who are now being subjected to a dual school system in violation of the Fourteenth Amendment and the laws of the United States, and who the court has found should be, and are, protected, and who should be in a unitary school system—the court is of the opinion that the defendant may utilize the procedures of 28 U.S.C.A. Sec. 1292 to the end that such an interlocutory immediate appeal, if the defendants should desire to do so, would materially advance the ultimate determination of this case. But this opinion, and the judgment to be entered immediately, will not be stayed pending this interlocutory appeal, if one is made, because of the defendants' right to an emergency appeal under Rule 2 and Related Rules and Practices of the Court of Appeals for the Fifth Circuit, and further because the parties have already had the transcript made of all the testimony and because the voluminous evidentiary data, which has been introduced into evidence, has been catalogued in such a manner that time will not be a real problem.

The plaintiffs and defendants will submit to this court by July the 15th a final plan which will achieve a unitary school system which will be educationally, administratively, and economically reasonable. It shall include a majority-to-minority transfer rule as suggested in Singleton, et al v. Jackson Municipal Separate School District, 426 F.2d

1364, decided on May the 5th, 1970, by the Court of Appeals for the Fifth Circuit.

The deputy courtroom clerk of the court, Miss Baker, shall select the twelve names which will comprise the human relations committee by arranging all six stacks of five names in an alphabetical manner and taking the top two names from each stack. This will provide a human relations committee of twelve persons—four of which will be Negro, four will be Anglo, and four will be Mexican. The clerk will communicate immediately with these twelve persons and inform them that the court wishes that they serve on this human relations committee, and if any should decline to serve, the clerk then will take the next name from the particular stack. The court has not seen nor looked at those names and does not know who they are except the court did ask the lawyers, and does ask the lawyers, to give us competent people, which I am sure they have done.

The court reporter will immediately transcribe these oral findings of fact and conclusions of law in this opinion and will file it with the clerk of the court and provide each party with a copy.

This court shall retain jurisdiction of this case until it is satisfied that the dual system has been disestablished and an unitary system is in existence for a sufficient length of time to indicate the dual system will not tend to be reestablished.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

JOSE CISNEROS, ET AL
v.
CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT

C. A. NO. 68-C-95

PARTIAL FINAL JUDGMENT

Pursuant to the opinion of the court rendered in open court on June 4, 1970, which is incorporated herein by reference wherein the court set forth Findings of Fact and Conclusions of Law, the court on this the 4th day of June, 1970, renders Partial Final Judgment as follows:

I.

On the merits of plaintiffs' claim pertaining to the present and past assignment of Negro and Mexican-American students the court is of the opinion that the facts and law are with plaintiffs and against defendant and judgment should be rendered for plaintiffs and against defendant.

It is therefore ORDERED, ADJUDGED and DECREED by the court that the present assignment of Negro and Mexican-American students, by the defendant Corpus Christi Independent School District does not conform to law.

It is further ORDERED, ADJUDGED and DECREED by the court that the defendant Corpus Christi Inde-

pendent School, the members of its Board of Trustees, and their successors in office, and the agents, officers and employees of the said district, and all those in active concert with them be, and they are hereby, permanently enjoined from discriminating on the basis of race, color or ethnic origin in the assignment of students, teachers and staff to the various schools of the district. It is further ordered that defendant School District shall take the following affirmative action:

1. Assign teachers and staff personnel to various schools so as to eliminate either racial or ethnic identifiability of any schools in the system and further so as to achieve an assignment of faculty and staff at each school in approximate proportion to the racial and ethnic composition of the school system's entire faculty and staff at the same school level, that is, elementary, junior high and high school.

2. In the consideration of new schools or expansion of existing facilities give consideration to the achievement or preservation of a reasonable mixture of Mexican-American and Negro students with other students in each such new or expanded facility.

3. File in this court on or before July 15, 1970, and simultaneously serve upon plaintiffs' counsel, a plan for the revised assignment of the student population to be effective before the commencement of the regular school term for the fall of 1970, which plan will conform to law. Such plan shall in the discretion of the defendant include the relocation of boundaries or attendance zones, pairing of schools, grouping of schools, bussing or other device which in the judgment of the defendant school district will promote the objective of a unitary school sys-

tem taking into consideration the pertinent educational, administrative and economic factors.

Such plan shall include a majority-minority right of transfer by Mexican or Negro students. Plaintiffs shall likewise file a similar plan.

This court has heretofore requested the parties to nominate citizens who reside in the area of the defendant district to serve as an Advisory Committee to this court and to the defendant district. The court shall designate in a subsequent order the citizens who shall constitute the Advisory Committee. Said Committee shall be granted access to all records of the defendant and shall submit proposals and advice to the district and to this court affecting the achievement, operation and maintenance of a unitary school system and all matters pertinent thereto, including but not limited to, new construction and new sites.

Pursuant to a stipulation of the parties, this court has heretofore severed the trial of a specific issue of this case, to-wit: the institution and maintenance of a sequence or grouping system for students. The court makes no finding with reference to the facts or law pertinent to such issue but retains jurisdiction of the case for the further trial and decision of said issue.

The court further retains jurisdiction of the case for the purpose of amendment, expansion or alteration of this judgment pursuant to the plans to be filed in this court on or before July 15, 1970.

This judgment is a final judgment of the merits of the case but is not a final judgment insofar as to the appropriate remedial action of the court in the premises. In making this partial final judgment, the court finds under

28 U.S.C.A. Section 1292 that this judgment involves a controlling question of law as to which there is substantial ground for difference of opinion insofar as this court has rendered judgment that Mexican-Americans are an identifiable ethnic group who are subject to the protection of the Fourteenth Amendment of the Constitution and of the laws of the United States and have been subjected to both de jure and de facto segregation. The court finds that if defendant district desires to appeal from this judgment that such an immediate appeal may materially advance the ultimate determination of the litigation and the court so states in this order, provided, however, that it is not the intention of this finding under 28 U.S.C.A. Section 1292 to stay proceedings in the District Court nor to suspend the effectiveness of this judgment. It is a further condition of this order that defendant shall exercise its right of appeal under the emergency appeal provisions of Rule 2 of the Federal Rules of Appeal Procedure and related rules and practices of the Court of Appeals for the Fifth Circuit and that Plaintiffs shall cooperate with defendants in the expeditious prosecution of said appeal.

ENTERED at Corpus Christi, Texas, this 4th day of June, 1970.

WOODROW SEALS
United States District Judge

APPROVED AS TO FORM ONLY:
CHRIS DIXIE
JAMES P. WOLF
JIM De ANDA
Attorneys for Plaintiffs
RICHARD A. HALL
Attorneys for Defendants

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ORDER

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Misc. No. 1746

JOSE CISNEROS, ET AL., Plaintiffs-Respondents,

versus

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT, ET AL., Defendants-Petitioners.

On Application for Leave to Appeal from an Interlocutory Order

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Before DYER, GEWIN* and GOLDBERG, Circuit Judges.

BY THE COURT:

IT IS ORDERED that leave to appeal from the interlocutory order of the United States District Court for the Southern District of Texas entered on June 4, 1970, in the above styled and numbered cause, is hereby DENIED.

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* Judge Gewin did not participate in the consideration of this case.

DISTRICT COURT'S SECOND MEMORANDUM OPINION

Jose CISNEROS, et al.

v.

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT, et al.

Civ. No. 68-C-95.

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

July 2, 1971.

MEMORANDUM OPINION

I. Background of this Litigation

Plaintiffs brought this action against the Corpus Christi Independent School District to require the District to comply with guidelines promulgated by the Supreme Court for the creation of unitary school systems wherever dual school systems have been found to exist. Plaintiffs contended (1) that Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), and its progeny, apply to Mexican-Americans as well as to Negroes; (2) that Mexican-Americans have been and remain segregated in the Corpus Christi Independent School District; (3) that Negroes have been and remain segregated in the Corpus Christi Independent School District; (4) that therefore, a dual school system has existed and still exists in Corpus Christi with regard both to Mexican-Americans and to Negroes; (5) that such segregation of Mexican-Americans and Negroes has been and remains primarily de jure segregation; and (6) that the court

should order the Corpus Christi Independent School District to disestablish its dual school system and to erect a unitary school system, in compliance with decisions of the Supreme Court and the Court of Appeals for the Fifth Circuit.

Defendants asserted, on the other hand, (1) that Brown v. Board of Education of Topeka, supra, does not apply to Mexican-Americans; (2) that even if *Brown* applies to Mexican-Americans, that ethnic group has not been and is not now segregated in the Corpus Christi Independent School District; and (3) that even if *Brown* applies to Mexican-Americans, and Mexican-Americans have been and are now segregated in the Corpus Christi public schools, such segregation has been and remains de facto rather than de jure segregation.

On May 14, 1970, the court commenced the trial of these issues, and continued daily thereafter, except from May 25 through May 29, until the conclusion of the evidence on June 3, 1970. Then, after eleven days of trial, the court rendered its oral opinion and partial final judgment on June 4, 1970.

In that ruling, Cisneros v. Corpus Christi Independent School District, 324 F. Supp. 599 (S.D. Tex., 1970), the court found (1) that "Mexican-American students are an identifiable, ethnic-minority class sufficient to bring them within the protection of *Brown* [supra]"; (2) that "Mexican-American students in the Corpus Christi Independent School District are now separated and segregated to a degree prohibited by the Fourteenth Amendment in all three levels of the school system: elementary, junior high, and senior high"; (3) that "Negro students in the Corpus Christi Independent School District are also segre-

gated to a degree prohibited by law * * *"; and (4) that although "some of the segregation was of a de facto nature," the Corpus Christi Independent School District is fundamentally "a de jure segregated school system." Cisneros, supra, at 606, 608, 615, 616, 620.

In its judgment of June 4, 1970, the court also ruled that, since an immediate appeal by defendants might materially advance the ultimate determination of the litigation, defendants should exercise their right of appeal under the emergency appeal provisions of Rule 2, Federal Rules of Appellate Procedure. The court also certified an interlocutory appeal under 28 U.S.C. § 1292. On July 10, 1970, the Court of Appeals for the Fifth Circuit denied defendants leave to appeal from this court's interlocutory order of June 4.

In its judgment of June 4, the court requested that each party submit the names of 15 persons (5 Anglo, 5 Mexican-American and 5 Negroes) from whom the court would select a human relations committee, to be representative of the community, and not to include attorneys, parties to the suit, school employees, or the spouses of any of these. The court clerk selected at random six persons from each party's list, and these individuals have since functioned as a human relations committee.[1]

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1. The original members of the committee were: Mr. Alvino Campos (chairman), Mr. Clemente Garcia (vice chairman), Mrs. Martha Gaertner (secretary), Dr. Robert Bosquez, Mrs. H. T. Branch, Mr. D. C. Brown, Jr., Rev. R. L. Brown, Mr. Huey Dorn, Mr. Rufino Garcia III, Mr. Duane McCullough, Mr. Thomas Perry, Mr. Lavernis Royal. Shortly thereafter, Mr. Perry resigned and was replaced by Mrs. John Thomason on August 24, 1970. Since its inception the committee has held 28 meetings, and many conferences with the parties to this suit. It has forwarded copies of its minutes to the court which have been sealed and may be opened only by this or

II. The Victoria Hearing

A. A Chronology

Soon after the original decision, a hearing was conducted in Victoria, Texas, to determine how a unitary school system might be best effectuated. The hearing was held in that city because of the damage to Corpus Christi caused by Hurricane Celia and the subsequent use of the United States Courthouse for emergency relief. The Victoria hearing lasted from September 2, 1970 to September 16, 1970 and the court heard testimony from Corpus Christi school officials, persons with experience in formulating integration plans, education experts, a private bus company operator, and interested citizens. The main thrust of all the testimony presented by both parties was to formulate a plan which would be educationally and economically sound, and would achieve a unitary school District. Understandably there were differences of opinion on how to do this and on what was "educationally sound" and what was a "unitary" school district. Any ideal plan will begin to break down when it must be put into reality.

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another federal court. The members of the committee have made speeches and met with civic and parental groups in an effort to smooth the path of compliance. The committee has submitted reports and recommendations to the school board and to the court and has in general functioned effectively and worked tirelessly. Their only compensation has been the appreciation of their neighbors and the accolades of the court for their selfless public service.

Because of the heavy workload of the committee it is necessary to expand its membership from twelve to eighteen for the time being. Plaintiffs and defendants through their attorneys shall each select three persons, including one Anglo-American, one Mexican-American, and one Negro-American, which nominees shall be added to the Human Relations Committee. At the end of May 1972, six new members shall be added in the same manner and the original members shall retire. Those persons who were nominated for membership to the original committee, but who did not serve, shall be eligible for membership.

Since the school district was Corpus Christi and not Utopia, much of the testimony centered on what costs—operational and social—one plan or another would entail. Transportation costs, transportation time, transportation safety, school pairing, grade pairing, single grade schools, modular education (the ungraded system presently in use), extracurricular activities, the neighborhood school, administrative difficulties, social mobility, housing patterns, home buying criteria, the value of exposure to different cultures and ideas, possible conflicts with existing state and federal laws or funding procedures, the experience of other Texas school districts and the problem of public acceptance were some of the subjects covered by the testimony.

At the hearing the court considered: the plaintiffs' proposed student assignment plan (Foster plans) filed on August 17, 1970 (a revision of plans submitted during the trial); the school district's revised plan filed on August 31, 1970, after the court had rejected its plan of July 15, 1970, as unconstitutional on August 26, 1970; and the elementary school plan submitted by the plaintiff and which was fashioned by a Corpus Christi housewife and patron of the school system. (Scott plan).

On September 15, 1970, the day before the hearing ended, the plaintiffs moved for the court to request the intervention of the United States Departments of Justice and of Health, Education and Welfare. Since the court had denied a motion for intervention by a non-profit group of Corpus Christi parents, Concerned Neighbors, Inc., in August as being untimely, the plaintiffs' unusual motion caused some concern. However, the court came to the conclusion that the experience, knowledge, and objectivity

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of these departments would aid the development of a unitary plan and so on October 16, 1970, the court requested their assistance. The court was further influenced by the fact that there appears to be a growing National Policy favoring integration as expressed in Government actions and, further, because any integration order would be helped by the active assistance of the Government.

Thereafter, the Office of Education and the United States Attorney's office participated in the conferences held in the case and filed such motions as they desired. A team from the Office of Education conferred with the Human Relations Committee and made trips to Corpus Christi to familiarize itself with the operation of the school system. On April 30, 1971, following the Supreme Court's April 20th decision in the so-called "busing cases,"[2] a conference was held with all parties. As a result of that conference an order was issued on May 3, 1971, directing the Department of Health, Education and Welfare to submit a plan by June 1, 1971, for the creation of a unitary school system not inconsistent with the guidelines in the *Swann* cases, n. 2 supra. The plaintiffs and defendants were given until June 10th to file their objections. The government's plan was submitted on June 2 and both parties filed their objections eight days later. Shortly after the filing of the HEW Plan, the Human Relations Committee addressed a written exhortation to the Board of Trustees, urging its members "to submit another proposal

2. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554; Davis v. Board of School Commissioners of Mobile County, 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed. 2d 577; McDaniel v. Barresi, 402 U.S. 39, 91 S.Ct. 1287, 28 L.Ed. 2d 582; North Carolina State Board of Education v. Swann, 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586; Moore v. Charlotte-Mecklenburg Board of Education, 402 U.S. 47, 91 S.Ct. 1292, 28 L.Ed.2d 590.

that has a chance of being accepted by the court." The Committee included a number of recommendations designed to assist the Board in formulating such a proposal.[3]

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3. The correspondence between the Committee and the Board follows:

June 8, 1971

Board of Trustees
Corpus Christi Independent School District
515 North Carancahua
Corpus Christi, Texas

Gentlemen:

Within the next few weeks our school system will be given a court ordered plan of desegregation. We feel that you are singularly qualified to develop a plan for our district. The excellent staff of our district has the ability to conceive a plan that would be relatively more feasible than any other plan, considering their knowledge of our district, it's neighborhoods and economics.

We strongly urge you to submit another proposal that has a chance of being accepted by the court. Our concern is that if you refuse to do this the court will select either the HEW plan or one of the plaintiff's plans and the citizens of Corpus Christi will have had no voice.

Should you elect to submit a plan to the court, this committee will ask Judge Seals to grant the district until July 1, 1971 to file it's plan. This request should in no way interfere with your intentions or desires to pursue this case all the way to the Supreme Court.

Enclosed are recommendations this committee hopes will be of some assistance to the Board of Trustees.

Sincerely,

Human Relations Committee
/s/ Alvino Campos, Chairman

AC:mg

cc: Judge Woodrow Seals
Dr. Dana Williams
J. W. Gary
Richard Hall
James Wolf
James De Anda
Corpus Christi Caller-Times
KRIS-TV
KIII-TV
KZTV-10

Footnote 3—Continued

HUMAN RELATIONS COMMITTEE RECOMMENDATIONS

When deliberations concern our independent school district the first and foremost responsibility must be the education of children. This responsibility must include all children in the district, encompassing every school in the district at every level. Our responsibility should be to see that opportunity throughout the system is equal and guaranteed; that economic and ethnic differences do not affect in any way our providing these opportunities. This also means the opportunity of learning from consistent facilities, equipment, buildings, program and instructors.

The second major responsibility should be to our providors i.e. taxpayer. We must strive to produce good results within his ability and willingness to continue carrying the burden of financing. By the same token the taxpayer must recognize his responsibility to the future and continue to support the public educational system even if he is occasionally at odds with the system or its methods. There is an economically enforced compromise between what the educator would like to or could provide and what the taxpayer could or would support.

Recognizing that our district has been found wanting by the court as regards its stewardship toward some of its children we are faced with the dilemma of correcting in a short period of time a problem that has been in the making for years. The solution again must be balanced between desire and economic reality while striving to achieve the best possible results educationally.

Toward these ends the following proposals are suggested as a method of assuring equality throughout the system as well as achieving learning experiences between the various ethnic groups involved:

1. At the high school level attempt to achieve a better balance between ethnic groups than is presently being accomplished mainly by some gerrymandering of district boundaries.

The need for extensive mixture of this age group is questionable since by this time impressions and opinions have long since been formulated. Also, since high school districts are geographically much larger than elementary schools they of necessity cut through many different neighborhoods and generally provide a better ethnic balance than lower level and smaller schools. As an example either the HEW or committee plan should fulfill the high school needs.

2. At the junior high level we suggest a plan that would attempt to balance the ethnic groups along a 75-25 or 25-75 ratio, so that the minority group in any school would not be less than 25% as nearly as is feasible. We strongly urge that no transportation islands or satellite zones be utilized.

3. Recognizing that successful desegregation will require skillful

Footnote 3—Continued

handling by administrators and faculty the following proposals are made for elementary schools:

a.) Pair or group schools on a basis that will achieve ethnic balance and that in the opinion of school officials is educationally feasible (considering facilities, space, etc.).

b.) We believe the modular system should be maintained. A possibility for consideration is to have children in the paired schools attend certain classes at one school certain days and on the other days attend classes at their neighborhood schools. For instance, schools A and II are paired—on Tuesdays and Thursdays the intermediate module is transported to school II for reading and english while the advanced module is transported to school A for arithmetic and science. Other schools could transport on other days so as to reduce transportation. Feasibility of this idea is strictly up to the school staff.

c.) In preference over the HEW plan another possibility to consider is the plaintiff's plan #2, Exhibit 218, for elementary schools which maintains the modular concept and requires relatively little transportation.

d.) Closely examine elementary boundaries and attendance zones for changes that should be made on a permanent basis to alleviate over crowding, etc.

4. Consideration should be given to a rotation plan for teachers whereby no teacher would remain in any school longer than three years. When a teacher signed his contract he would know that he would be subject to transfer every three years. In order to provide continuity within the individual schools approximately one third of the faculty could rotate each year. This would mean at the inception of this program some teachers would move after one year and some after two years until the rotational balance had been established. This would insure that instructors would be in continual rotation throughout the district.

5. Elementary level PTAs in paired schools could function as a single unit drawing their membership from the two school areas. For example, if Wilson and Evans were paired it would become the Wilson-Evans PTA. Monthly meetings would alternate between the two schools and the presidency would be an Evans resident one year and a Wilson resident the next year. This type of arrangement would be particularly helpful since the parents are much in need of developing a rapport between ethnic groups—this would tend to ease the problem.

These suggestions should achieve several factors that the court has been concerned about and at the same time they would be less costly

Footnote 3—Continued

when other options are considered. They are suggestions that we hope the district may find helpful but by no means are they submitted as a complete plan or a complete list of possibilities.

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT
515 North Carancahua
P. O. Drawer 110
CORPUS CHRISTI, TEXAS, 78403

Mr. Alvino Campos, Chairman
Human Relations Committee
706 Burkshire
Corpus Christi, Texas

Dear Mr. Campos:

Your letter of June 8, 1971 with committee recommendations attached was immediately shared with each member of the Board of Education and our Administrative Staff. The recommendations which you made have been carefully considered. Our response would have been discussed at our board meeting on June 21 had the item not been inadvertently left off of our agenda.

In order that there might not be an unnecessary delay in advising the committee of the general attitude of our board concerning your recommendations, I am taking it upon myself to send you a document which has been shared with other members of our board. I am of the opinion that the board agrees with the information contained in the response since each member has had an opportunity to study and review it. Our Board of Education will be meeting on Monday, June 28, 1971, and at that time the attached response will be discussed. If there are any changes, you will be notified immediately. In the meantime, I am of the opinion that you can be reasonably sure that the document does express the combined thoughts of our Board of Education.

The Board of Education joins with me in recognizing the committee for the time and effort which it has given in making its recommendations to us. We sincerely respect the recommendations you have made and likewise ask the same consideration of us from your committee.

Sincerely yours,

(s) Forrest C. Allen, President
Board of Education of the
Corpus Christi Independent School District

fp
Enc.
cc: Dr. Dana Williams

Footnote 3—Continued

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT
515 North Carancahua
P. O. Drawer 110
CORPUS CHRISTI, TEXAS, 78403

TO: Human Relations Committee

FROM: Forrest C. Allen, President of the Board of Education of the Corpus Christi Independent School District

SUBJECT: RESPONSE TO HUMAN RELATIONS COMMITTEE RECOMMENDATIONS

The Board of Education is pleased that the Human Relations Committee joins the Corpus Christi Independent School District in expressing the conviction that the education of children should be the first and foremost consideration in determining deliberations concerning the school district. The Board agrees that these educational considerations must include all children in the district and encompass each school in the district. It has long been the Board's conviction that educational opportunity throughout the system be equal and guaranteed, that economic and ethnic differences have no effect on providing such opportunities, and that the vehicle for providing educational opportunities should be consistent for each child on each school campus. In addition, the Board is pleased to note that the Human Relations Committee is also concerned about economic considerations and their relationship to education excellence. The citizens of the community have repeatedly demonstrated their ability and willingness to finance appropriate educational programs. The Board joins the committee in their expression that educational programs must be tailored to the community's ability to support such programs and must meet the test of accountability.

The Board however cannot accept nor support all of the recommendations made by the Human Relations Committee and still maintain the excellence of educational opportunities offered in this community. Each recommendation is hereinafter considered and the Board's position concerning this recommendation is noted:

1. At the High School level attempt to achieve a better balance between ethnic groups than is presently being accomplished mainly by some gerrymandering of district boundaries.

The need for extensive mixture of this age group is questionable since by this time impressions and opinions have long since been formulated. Also, since high school districts are geographically much larger than elementary schools they of necessity cut through many different neighborhoods and generally provide a better ethnic balance than lower level and smaller schools. As an example either the HEW or committee plan should fulfill the high school needs.

Footnote 3—Continued

Ans: The Board does not agree that gerrymandering of high school attendance zones is necessary to accomplish a balance between the racial and ethnic groups at the senior high school level. The equidistant plan proposed under protest by the Board of Education provides as effective an ethnic balance for the district's high schools as does the high school satellite attendance plan proposed by the Department of Health, Education, and Welfare.

2. At the junior high level we suggest a plan that would attempt to balance the ethnic groups along a 75-25 or 25-75 ratio, so that the minority group in any school would not be less than 25% as nearly as is feasible. We strongly urge that no transportation islands or satellite zones be utilized.

Ans: The Board feels that it is impossible to realize a consistent minority ratio of 20% or more in all of the junior high schools in the city through the gerrymandering of attendance zones. The Board agrees with the Human Relations Committee that transportation islands and satellite zones should not be utilized as a means of achieving any set ethnic ratio for the district. The Board feels further that it is not administratively feasible to establish identical ethnic ratios in the junior high schools as continued movement of individuals within the city will rapidly disestablish such ratios thereby requiring a continual adjustment of boundaries.

3. Recognizing that successful desegregation will require skillful handling by administrators and faculty the following proposals are made for elementary schools:

a.) Pair or group schools on a basis that will achieve ethnic balance and that in the opinion of school officials is educationally feasible (considering facilities, space, etc.).

Ans: The Board cannot accept the proposition that the pairing of elementary schools and the subsequent transportation of pupils made necessary by such pairing will result in a plan that is more educationally feasible than the district's current plan of providing unique educational opportunities to pupils in attendance zones in which they reside.

b.) We believe the modular system should be maintained. A possibility for consideration is to have children in the paired schools attend certain classes at one school certain days and on the other days attend classes at their neighborhood schools. For instance, schools A and H are paired—on Tuesdays and Thursdays the intermediate module is transported to school H for reading and English while the advanced module is transported to school A for arithmetic and science. Other

Footnote 3—Continued

schools could transport on other days so as to reduce transportation. Feasibility of this idea is strictly up to the school staff.

Ans: The Board supports the Human Relations Committee in the belief that the modular system is educationally sound and should be maintained. The Board, however, cannot accept the proposition that pupils attend school in alternate elementary schools on alternate days. Such attendance would destroy the continuity of planning essential to any instructional program and critical to any program utilizing the teaming of teachers. The lack of knowledge and understanding of pupils' unique needs, aptitudes, and abilities inherent in such a plan would totally negate any educational advantages of an alternate attendance strategy. It is questionable whether this plan could meet any test of administrative feasibility.

c.) In preference over the HEW plan another possibility to consider is the plaintiff's plan #2, Exhibit 218, for elementary schools which maintains the modular concept and requires relatively little transportation.

Ans: The Board must reject any proposal which involves the transportation of certain pupils in the district as such proposals are discriminatory to those pupils transported. In addition, if an ethnic balance approximating that of the city is the order of the Court, Plaintiff's Plan #2, Exhibit 218 does not meet this order as only ⅓ rather than ½ of a school population is being transported.

d.) Closely examine elementary boundaries and attendance zones for changes that should be made on a permanent basis to alleviate overcrowding, etc.

Ans: The board feels that the suggestion to closely examine elementary boundaries and attendance zones for changes that should be made to alleviate overcrowding is consistent with the Board of Education's practice of realigning school boundaries in the past. However, the suggestion that attendance boundaries should be made on a permanent basis is inconsistent with the proposal to maintain student balance. Making such boundaries permanent would prohibit the Board of Education from subsequent changes of boundaries to equalize subsequent overcrowding.

4. Consideration should be given to a rotation plan for teachers whereby no teacher would remain in any school longer than three years. When a teacher signed his contract he would know that he would be subject to transfer every three years. In order to provide continuity within the individual schools approximately one third of the faculty could rotate each year. This would mean at the inception

Footnote 3—Continued

of this program some teachers would move after one year and some after two years until the rotational balance had been established. This would insure that instructors would be in continual rotation throughout the district.

Ans: The Board must reject the plan proposed by the Human Relations Committee for the rotation of teachers every three years. The energies of the school district in staff development have been directed toward the formulation and training of teacher teams. The rotation of ⅓ of the teaching staff each year would severely hamper this concept and the ability for teacher teams to be continued in the district. Literature in the area of teaming indicates the basic complement of a team must be together a minimum of three years to reach a level of efficiency necessary to go beyond more than the most rudimentary skills of team planning, team decision making, and team implementation. The rotational plan proposed by the Human Relations Committee would maintain a constant turnover within the team, thereby negating the team's ability to reach a high level of team implementation. There is a strong probability that the Department of Personnel would encounter trouble in recruiting if prospective teachers knew in advance they would not be able to be provided an assignment which would permit a degree of permanency. The rotation of ⅓ of a school district's staff in any one year could result in the realignment of ethnic and racial ratios of teachers and thereby be in violation of the order of the District Court concerning this matter. In addition, there is a high probability that this type of plan would seriously affect staff morale. Although the rotation of the entire staff every three years is questionable educationally, a plan of rotation consummated over a period of time greater than three years may be operational, and will be considered by the Board of Education.

5. Elementary level PTAs in paired schools could function as a single unit drawing their membership from the two school areas. For example, if Wilson and Evans were paired it would become the Wilson-Evans PTA. Monthly meetings would alternate between the two schools and the presidency would be an Evans resident one year and a Wilson resident the next year. This type of arrangement would be particularly helpful since the parents are much in need of developing a rapport between ethnic groups—this would tend to ease the problem.

Ans: The Board of Education is in no position to dictate to PTAs as to the manner in which they hold their meetings or elect their officers.

Footnote 3—Continued

In summary, the Board is concerned that the Human Relations Committee failed to note the many programs initiated by this school district to achieve the very objectives established by the Human Relations Committee as legitimate.

The recommendations made by the Human Relations Committee imply that the transportation of junior and senior high pupils is not an acceptable alternative as they strongly urge no transportation islands or satellite zones be utilized. On the other hand, their recommendations imply that the transportation of elementary age pupils is an acceptable alternative to the district's current operational procedures. This inconsistency in the committee's outlook on the educational advantages of transportation is difficult to understand.

The committee has stated that there are more feasible plans available to the school district than those presented by the plaintiff or the Department of Health, Education, and Welfare. Holding such an opinion, the committee should recommend that in their opinion the plans presented by the plaintiff and the Department of Health, Education, and Welfare are not feasible alternatives for this school district.

The Board of Education appreciates the committee's assessment of the expertise of the district's staff. Apparently the court does not agree with the committee's conviction that the staff is singularly qualified to develop a plan which will realize the court's objectives. The Board has drafted two separate plans which the court has declared to be unacceptable. In addition, the court has requested the Department of Health, Education, and Welfare to prepare a plan for consideration.

It is the conviction of this Board of Education that the Corpus Christi Independent School District is a unitary school system. The preparation of additional plans at this time would be inconsistent with this conviction. If the committee does not share the feeling of the Board of Education, it may be advisable for the committee to prepare and submit a plan for the court's consideration.

From analyzing the recommendations of the committee, the Board of Education is pleased that the committee and Board agree on so many basic areas. It is unfortunate that this mutual agreement does not include every aspect of the case. Such lack of consensus is understandable however in areas as complex as the one before us. It is our sincere hope that the Human Relations Committee can support the Board's commitment to quality education in this community and will assist us in finding an acceptable alternative to the transportation of a large number of our children to schools in other sections of the community than their neighborhoods.

On June 10, the court granted defendants an additional period, until June 21, to file another plan. The Board declined this opportunity, and so notified the court on June 16. On June 18, the court received a letter containing general proposals for integration, from David Saenz, a school patron and witness for the defendants. This was treated as a motion for intervention and denied on June 28, 1971. No further plans were filed.

B. The Issues at the Victoria Hearing

[1] One of the thorniest questions faced in the remedy phase was the amount and cost of transportation necessary to carry a unitary plan into effect. The plaintiffs contended that money would be available from the federal government and that, if necessary, the school district could pledge delinquent taxes as security in purchasing buses. The School District replied that the federal money, though available for transportation, was not available for transportation alone, and that if it did not comply with state regulations on the purchase and acquisition of new equipment it would not receive its share from the Foundation School Fund. Since the decision in North Carolina State Board of Education v. Swann, 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971), this should no longer be a problem. There Chief Justice Burger stated:

> * * * if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees. *Id.*, at 589, 91 S.Ct. at 1286.

If necessary, the state could be enjoined from depriving the school district of its foundation funds where the school district is operating under a desegregation order.

[2] The defendants also argued that the plaintiffs' plan would deprive the district of federal monies for programs for the educationally disadvantaged by breaking down the concentrations of disadvantaged pupils. The plaintiffs contended that the funds could follow the pupils. The purpose announced in 20 U.S.C. § 241a is to assist local education agencies serving areas with concentrations of children from low income families. Although the law requires concentrations sufficient to make the grant worthwhile, the concentration is to be determined on an area basis. 20 U.S.C. §§ 241c(b), 241-11(a) (2). It is further provided that additional grants are available for programs and projects "(A) which are designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families and (B) which are of sufficient size, scope and quality to give reasonable promise of substantial progress toward meeting those needs * * *." 20 U.S.C. § 241e (a) (1). The *program* must be designed to help youngsters who come from high concentration areas. Whether that attendance area is paired or grouped with other areas, or made the satellite zone of a wealthier area will not change the fact that that attendance area contains a high concentration of low-income families. The plaintiffs' contention that the money will follow the child so long as the program is beneficial would seem to be correct.

Another objection voiced by the school district to the plaintiffs' proposal was that the plan would break up the

modular education system recently adopted in Corpus Christi and make it difficult to use reading, learning and media (library) centers. On the elementary level the plaintiffs' plan would disrupt the modular system in some schools. It was brought out, however, that the modular system was flexible and could be adapted to an integrated system.

The school district pointed out that the basic plan in Corpus Christi was a neighborhood plan and that the plaintiffs' plan departed from this and would render unusable certain classroom space and facilities by closing them. The plaintiffs' plan would require several closings and should be resorted to only in the most extreme case. It is unnecessary here.

The school district further objected that the plaintiffs' plan would require a child to attend several elementary schools during his school career. In light of the mobility of the American population this objection carries little weight. In fact, the school district relied on this mobility in arguing that the composition of the neighborhoods would change anyway. This in itself would cause a child to change schools, but physical mobility and resulting changes in neighborhood ethnic composition should not be permitted to deprive a child of an equal opportunity to a quality education.

That families might move to avoid the bogey-man of "forced busing" is another problem of mobility and could create unreasonably low prices for some houses and inflated prices for others. The best way to forestall this is adoption of a plan which will distribute the burden of integration equally and fairly throughout the community.

The school board also pointed out that existing public transportation would be inadequate to handle any large scale transportation needs. This is true. However, the regular city system can provide some relief as can the use of city buses on special routes.

The school board also argued that busing would have an adverse effect on education, extracurricular activities, and on peer group contacts. However, its witnesses could not give a definite distance at which transporting students would be injurious to their physical or mental health, or to their studies. It appears that school buses are in fact a safer means of transporting children to school than any other. As to education and peer groups, the heterogeneous grouping within the school would be beneficial of itself by increasing the opportunity for the exchange of ideas and attitudes. Extracurricular activities of some students will be limited if schools are not within a short distance of home. However, special bus routes can be arranged to serve the schools after dismissal, and students can still resort to the regular city buses or to car-pools. Participation in extracurricular activity may become more difficult; it will not be impossible. The school authorities could lengthen the day by one period and devote it or some other period to extracurricular activities. Presently, athletic and band practices often require the parents to make special transportation arrangements. Readily available buses may reduce this burden.

The possible cost of purchase and maintenance caused the school district to compare the present tax rate and assessment with other cities. The defendants argued that the tax base was too narrow to support further increases. The plaintiffs countered that areas with less industry than

Corpus Christi were generating more tax monies. This is an unfair comparison. People tax themselves to pay for the services they want. Some non-industrial areas have high property values because they are populated by wealthy citizens who derive their income from businesses located elsewhere. If the school authorities decided to finance buses through a tax increase it could be done, but it would not be painless. The plaintiffs did point out that the school district could increase its evaluation if it used the offices of the County Tax Assessor-Collector rather than the city tax office.

Finally the defendants contended that massive busing would create heavy absenteeism and that this would work a corresponding reduction in state funds. Absenteeism would reduce available state funds, but absenteeism need not occur because of a change in attendance zones. If the school board decides to use buses to transport children to schools which are not within walking distance, the school will be just as accessible as the bus route. It was also pointed out at the hearing, and remains true today, that the Spring Branch Independent School District in the Houston metropolitan area buses all of its students and that the safety and convenience of buses is used as a selling point in the advertising of homes in that area. That buses make the school as close as the front door is also emphasized in advertisements in the Houston papers for new residential developments in the Houston area.[4] It is

4. Although these ads were not admitted into evidence they, and others like them, could not escape the court's attention and it would not be erroneous to take note of their existence. An ad for the Clear Lake City development calls attention to free bus service for the public intermediate school. Houston Chronicle, June 20, 1971, Home Section p. 14. Trailwood Village has an elementary school within the development and free bus service to the intermediate school and high

not really busing which Americans find objectionable, but what is at the end of the bus line.

[3] In summary, the defendants put forward a series of objections to the plaintiffs' plan and reasons why no remedy could be implemented. They did not develop a unitary plan which was constitutionally permissible even though the burden is theirs and not the plaintiffs. Green v. County Board, 391 U.S. 430, 437-438, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968). That they did not is unfortunate, for the court lost the experts it needed the most. Instead, because of its previous stance and the exigencies of the adversary system, the school board refought the battle of the neighborhood schools. It is undeniable that having the school close to the home and the parents enables some parents to reinforce the received education.[5] There is noth-

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school in Humble. Houston Chronicle, June 20, 1971, Home Section p. 13. The Park Glen community in the Alief School District features busing for kindergarten and elementary students. Houston Chronicle, June 20, 1971, Home Section p. 5. The Forest West development has bus service to the Catholic elementary school. Houston Chronicle, June 20, 1971, Home Section p. 19. Shenandoah Valley in Montgomery County boasts that the Conroe, Texas schools are "as close as your front door". Houston Chronicle, June 20, 1971, Home Section p. 21. These ads indicate that busing, like neighborhood schools, is not evil *per se*, and, like the neighborhood school, can be used to promote either integration or segregation.

The court takes judicial notice of these advertisements and they are admitted into evidence as court's Exhibits 4, 5, 6, 7, and 8.

5. Unfortunately this reinforcement is not always available at home and the supposed benefit of the neighborhood school is not received as the following editorial illustrates:

PEOPLE APART

> The American "melting pot" has successfully assimilated a wide variety of representatives from diverse ethnic origins. But we have failed to assimilate Mexican-Americans, who to a great degree remain a people apart.
>
> Mexican-Americans are the "least Americanized" of all ethnic groups in the country, Dr. R. L. Skrabanek, Texas A & M Uni-

ing wrong or vicious about neighborhood schools. They represent an attempt to provide quality education easily and without distinction to all. It is incorrect to think of neighborhood schools as ends in themselves, rather than means to an end. The question is not the primacy of

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versity sociologist, asserts in an article in the current issue of the "International Journal of Comparative Sociology." The Spanish language, he found, was the main bar to Americanization. For more than 100 years their language usage patterns have changed very little.

In a study using interviews taken in 544 Mexican-American homes in Atascosa and Bexar Counties, Skrabanek found no one living in a Mexican-American household and old enough to talk who was unable to speak Spanish fluently. While Mexican-Americans found in higher income levels speak mostly English, those who speak Spanish almost exclusively are highly concentrated in low status occupations. Until language patterns change he foresees little prospect of successful assimilation.

This is a familiar subject in South Texas, argued inconclusively through the years. A number of projects have been initiated with the hope of persuading families to speak English in their homes. None of them succeeded. Only in rare, well educated Mexican-American households are children required to speak English in the home.

Most Mexican-Americans take offense when their use of Spanish is criticized. They miss the point. It is not that a fluency in Spanish is not desirable. On the contrary, all children, whatever their origin, should be able to speak Spanish. The point is that all children should have fluency in English. The difficulty of gaining fluency in English is magnified greatly if English is not learned in the home as the "first" language.

All the pre-school English classes being taught locally can never solve the problem completely. Those who continue to cling to Spanish as their "first" language rarely enter fully into the mainstream of American life. The educational and occupational status of this group remains comparatively low.

There is no wish to turn one's back on the rich cultural heritage from Spain by way of Mexico that is shared by all Texans. There is, instead, the hope that English, the language of the United States, be given the priority that is essential to common understanding among all Americans.

Corpus Christi Caller-Times
March 14, 1971 at 2B.

busing or of neighborhood schools: the question is equal protection. Public schools do not exist for the benefit of persons in one part of the community, but for the benefit of all. All persons should have equal access to the educational opportunity offered by the public school. Where races, religious, or ethnic groups become segregated, this breaks down the concern which individuals should have for the well-being of the whole community and for each of its members. It is this breakdown and the constitutional guarantee of equal protection which creates the duty to act affirmatively to bring about integration of public facilities and precludes reliance on the neighborhood school concept where the housing patterns operate to exclude significant numbers of students of any ethnic group from schools within the district.

In this context, a recent California decision is most illuminating. The Superior Court for Los Angeles County has held that rigid application of the neighborhood school concept in the face of changing housing patterns which created segregated neighborhoods is in fact a denial of equal protection and turns *de facto* into *de jure* segregation. Johnson v. Inglewood Unified School District, Cal. Super. Ct., Los Angeles County, 1970, No. 973-699. The rationale of this decision will have great impact in the North, but as to Corpus Christi it illustrates the point that insisting that children in a segregated neighborhood attend a school in that neighborhood amounts to government supported segregation. See, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554, 561-562 (1971).

III. The Decision in *Swann*

The central question in the minds of all of the parties at the Victoria hearing was what could a federal district

court do to achieve a unitary school system and how far could it go. Since the school year had already begun and since the Supreme Court was considering that question, it seemed more prudent to await the decision of that question rather than to act in haste. On April 20, 1971, the Supreme Court decided five cases which resolved the beginning with Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

[4] While the Court stated that it was impermissible to require a school system to meet and maintain a racial enrollment in every school which reflected the racial composition of the whole system, still these ratios could be considered as a starting point in the shaping of a remedy. *Id.*, 402 U.S. at 25, 91 S.Ct. at 1280, 28 L.Ed.2d at 571. The Supreme Court went on to hold that a District Court could alter attendance zones, pair or group schools, use noncontiguous zones, and even order busing in an appropriate case. *Id.*, 402 U.S. at 27-31, 91 S.Ct. at 1281-1283, 28 L.Ed.2d at 573-575. It is clear that when school authorities fail to fashion an acceptable plan the District Court is given broad discretion to act within reason to develop and implement a plan which will effectively achieve a unitary school system immediately.

IV. Description and Evaluation of the Various Plans

The school board submitted student assignment plans for the elementary, junior high, and senior high schools which it felt achieved more integration than presently existed, but which would neither impair the functioning of the modular system nor depart from the neighborhood school concept. The elementary plan was a resubmission

of the boundaries which had already been held unconstitutional by this court. The school board was of the opinion that this was the best plan commensurate with the safety and education of the elementary school children. The plans for junior high and senior high attendance areas involved some boundary changing which shifted areas from one zone to another, but left each attendance zone self-contained. These plans can be best described as "modified" neighborhood school attendance zones. In no instance did it approach the ratio of Anglo, Mexican-American and Negro students within the district. Nor did the school authorities pretend that they were doing so; they steadfastly defended the neighborhood school as an indispensible and fundamentally sound educational concept.

Plainly, the school board wished to avoid the expense, dislocation, and public outcry resulting from plans which would involve transporting any significant number of students. Throughout the hearing the plaintiffs made it clear that they were in favor of integration, *not* busing, but that if busing was necessary to achieve unitary schools, it was a permissible tool. In their elementary plan the plaintiffs did not propose to redraw all of the attendance lines and even left undisturbed some schools with heavy ethnic imbalance, presumably in an attempt to defuse the busing issue. For the other elementary schools the plaintiffs resorted to "pairing" of separated schools, i.e., putting all the children from paired schools together grade-by-grade and alternating the grades between the schools (all first graders at school A, second graders at school B, etc., or all grades 1-3 at school A, grades 4-6 at school B, etc). The plaintiffs recommended that two elementary

schools (Washington and Southgate) be closed and their students assigned to Cole Junior High, which would be converted to an elementary school. It was also recommended that Crossley be closed and its students reassigned to Oak Park, Savage and Gibson. Beach Elementary was destroyed by Hurricane Celia and the parties agreed that it should not be rebuilt. Crockett, Furman, Savage and Southgate elementary schools were damaged by the hurricane and non-permanent repairs were permitted to these facilities. By order of May 3, 1971, the plaintiff and the United States were required to file any objections to permanent repairs to these facilities as outlined in the contractor's estimate of cost of repair. No objections were filed and on June 3, 1971, an order was signed permitting construction to commence.

As to junior high schools, the plaintiffs utilized the "transportation island" or "floating zone" concept to move the school population around so that no school would be "racially identifiable" (85% or more of one group, or of two minority groups by the reckoning of Dr. Gordon Foster, plaintiffs' expert). Under this system a school would have a basic assignment zone around it which would be supplemented by non-contiguous zones—some within walking distance, some not.

The plaintiffs' plan for the senior high schools involved neither pairing nor transportation islands. Instead the attendance zones were adjusted to run more or less perpendicular to the "corridor" area of heavy Mexican-American concentration so that none of the schools were "racially identifiable", even though one ethnic group or the other might be predominant.

The plaintiffs also submitted the Scott plan for the

elementary schools which reflected another approach to the use of the "pairing" device.

The plans submitted by the intervenor U. S. Department of Health, Education and Welfare's Office of Education used "pairing" in 32 of the elementary schools and left ten schools unpaired. Of these latter, one, Travis School, had some of its students reassigned to both paired and unpaired schools because of the overcrowding at Travis occasioned by public housing projects. At the junior high level, the H.E.W. paired-off 10 schools and established "satellite zones" between them. In some cases, this merely changed the shape of the schools' contiguous attendance zone, while in others the zone consisted of an area surrounding the school and another area some distance away. Three junior high schools, Haas, Shannon and Driscoll, were unaffected.

The H.E.W. high school plan left King, Ray, and Miller high schools with their present boundaries and set up "satellite zones" between Moody and Carroll.

The plans submitted and resubmitted by the school district based upon a neighborhood school design must again be rejected because the plans fail to integrate the schools or hold out a promise of doing so.

The plaintiffs' plan for the elementary schools would force the closing of several schools against the good judgment of the school board and would put an unnecessary burden on the modular system. The junior high plan appears to be workable and would eliminate what the plaintiffs regard as racially identifiable schools. The high school plan would nearly equalize the Anglos and Mexican-Americans at Ray High School, reduce the Anglo predominance

at Carroll and King, reduce the Mexican-American predominance at Moody and increase it at Miller. The number of Negro students at Miller would remain relatively unchanged, and about half the Negro students at Moody would go to Carroll.

[5] The elementary school pairing plan submitted by the H.E.W.'s Office of Education eliminates racial imbalance in all the schools. The minority percentage ranges from a low of 49% to a high of 72%. If busing is used, the paired schools are so grouped that routes could be arranged which would make it possible to pick up the students for several schools along a route and drop them off as the bus reached the school. This is much more satisfactory than shuttles operating between paired schools. The Government's plan would also require the transfer of kindergarten children. This is unrealistic, since not all schools have kindergartens and since kindergarten is only a half-day program. The H.E.W.'s plan would break-up the middle module (formerly grades 3 and 4) of the ungraded system. This is a drawback, but the flexibility of the modular system should enable it to adapt to the change. The H.E.W. junior high plan brings about a reasonable ethnic mix at all of the schools except South Park and Haas. Haas is left predominantly Anglo, and the pairing-off of South Park with Cunningham increases Mexican-American predominance at South Park from 2:1 to 8:1. The H.E.W. plan for the senior high schools would bring about excellent ethnic balance at Moody and Carroll; unfortunately those are the only schools it affects, even though the H.E.W. classified Miller High School as imbalanced with 81% minority enrollment. Better results could have been achieved here by adjusting the Miller-Ray boundary and creating a satellite zone for

Miller somewhere in the Ray or King attendance area. As proposed, the H.E.W. high school plan might violate the principle announced in Davis v. Board of School Commissioners of Mobile County, 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577 (1971), that it is error to treat one part of the school system in isolation from another and integrate only within that part. *Id.*, 402 U.S. at 38, 91 S.Ct. at 1292, 28 L.Ed.2d at 581. It is unfair to put the burden of integration on a few parents and students within the Crockett elementary attendance area of Moody High and the Sanders and Schanen elementary attendance areas of Carroll High. To do so causes neighbor to resent neighbor. Integration is a *community* problem.

It appears to this judge that Americans are more willing to accept a real or imaginary burden if its effects are shared. To place some members of the community under a hardship and to permit others similarly situated to escape is not the way to achieve general acceptance of any plan.

The plaintiffs had no objection to the H.E.W. plan for the elementary schools, but regarded the high school plan as totally unacceptable. The plaintiffs objected to the pairing-off of South Park Junior High and Cunningham Junior High since it would make South Park 85% Mexican-American. The plaintiffs also objected to the combination of Baker and Wynn Seale junior highs because the satellite zone within Baker is almost evenly balanced between Anglos and Mexican-Americans and would do little to alter the imbalance at Wynn Seale. Instead, the plaintiffs proposed that Baker and South Park be dropped from the plan and be replaced by Haas and Shannon junior highs which are approximately 89% and 77% Angl

respectively. Unfortunately, the plaintiffs did not designate the areas which they thought would make better satellite zones.

The school board objected to the entirety of the H.E.W. plan as putting an onerous, expensive and unnecessary burden on the school district, and as a plan which would produce educational chaos. The school district quite accurately criticized certain of the H.E.W.'s suggestions as tardy, too general, and as designed for a bi-racial rather than a tri-ethnic situation. Specifically, the school district contended that the implementation of the H.E.W. plan would impair the functioning and effectiveness of its programs for culturally deprived children by depleting financial resources and scattering students and teachers. Further, the cost of transportation inherent in the H.E.W. proposals would divert funds from general education programs. It was also felt that the H.E.W. plan would damage the pre-school education programs (Kindergarten, Head-Start), the Bilingual-Education program, the use of Listening-Viewing-Reading Centers, Title I Programs, Cooperative Teaching, extra-curricular activities, and student-pupil ratios. Above all, the district objected to the splitting of the intermediate module of the elementary schools called for by the H.E.W. plan. The defendant also objected to the treatment of Travis Elementary School, where some 650 Mexican-American children would be assigned to other schools in the district purely on the basis of ethnicity and with no means of selection or augmentation provided. The school authorities also objected to the administrative confusion the plan would cause and to the use of a different approach to elementary education in the plan than used by the school district in

its design of programs and buildings. The school district repeated its objections to any plan which caused students to be transported beyond their neighborhood school and which would discourage parent participation in the educational process.

V. Implementation of the Court's Student Assignment Plans

A. The Court's Plan

[6] The present litigation has occupied the court's attention for nearly three years, including 20 days of trial.[6] The vast assortment of pleadings, motions, briefs, reports, proposals, maps, charts, and a variety of other exhibits is sufficient to fill a small room. Extensive delay has been occasioned by the massive volume of evidence submitted, by natural disaster, and most fundamentally, by the great confusion and uncertainty that has attended virtually all desegregation suits filed throughout the United States during the past several years.

The Supreme Court has made clear, however, that delay can no longer be countenanced:

> "* * * continued operation of segregated schools under a standard of allowing 'all deliberate speed'

6. The records of the U. S. District Clerk's Office reflect that this judge, in addition to arraignments, sentencing and writing opinions, did the following during the calendar years 1969 and 1970:

1969	Pretrials	240
	Trials	55
	Days in trial	146
1970	Pretrials	280
	Trials	57
	Days in trial	140

In addition, this judge spent 7 months of each year in Corpus Christi and had to make a 400 mile round trip each weekend for 14 months.

> for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems *at once* and to operate now and hereafter only unitary schools." Alexander v. Holmes County Board of Education, 396 U.S. 19, 90 S.Ct. 29, 24 L.Ed.2d 19 (1969), reh. denied, 396 U.S. 976, 90 S.Ct. 437, 24 L.Ed.2d 447 (1969).

The Court has at last defined the extent to which lower courts can and must implement the mandate to immediately dismantle all dual school systems. The desegregation plans adopted by a district court must be "feasible," "workable," "effective" and "realistic," Swann v. Charlotte-Mecklenburg, 402 U.S. at 31, 91 S.Ct. at 1283, 28 L.Ed. 2d at 575. These adjectives are used to describe a plan which promises to replace at once a school system that effectively excluded children from schools because of their race, religion, or ethnic background, with a program which integrates the student population.

The student assignment plans to be described below reflect plans submitted by the parties and alterations made by the court. From the figures available to the court it appears that no school at any level will be ethnically identifiable, although one group or another may be in a majority. No attempt has been made to meet a certain ratio throughout the school system or at any one school. However, there is no school which does not have a substantial number of students from the minority ethnic groups, nor is there any school which does not have a substantial number of Anglos. "Substantial" may be a poor word since it cannot be defined with mathematical precision. We are not, however, seeking mathematical precision, but a system which opens all the schools in the

district to attendance by students of *all* ethnic groups in significant numbers. In a district in which the Mexican-American and Negro students are almost one half of the student population attendance by 20% or less Anglo students or 20% or less Mexican-American and/or Negro students at a single school is probably attendance in insignificant numbers. In a school district where only 15% of the students are minority group members attendance by minority students at a single school at around 3% or 5% might not be regarded as insignificant.

The court finds that the following plan has a realistic chance of creating a unitary school system, will not be an undue economic burden and will not disrupt the educational process more than is necessary to secure rights guaranteed under the Constitution. There are to be no exceptions to this student assignment plan for students in extracurricular or co-curricular activities, including but not limited to, class officers, school publications, band, cheer leaders, and athletics.

I. Elementary

A. Attendance zones for the following schools shall remain unchanged, except that they shall be paired, with grades assigned to each as follows:

1.	Sanders:	grades 1-3
	Los Encinos:	grades 4-6
2.	Fisher:	grades 1-3
	Washington:	grades 4-6
3.	Wilson:	grades 1-3
	Evans:	grades 4-6
4.	Schanen:	grades 1-3
	Garcia:	grades 4-6
5.	Prescott:	grades 1-3
	Yeager:	grades 4-6

6.	Chula Vista:	grades 1-3
	Parkdale:	grades 4-6
7.	Crockett:	grades 1-3
	Montclair:	grades 4-6
8.	Austin:	grades 1-3
	Woodlawn:	grades 4-6
9.	Shaw:	grades 1-3
	Smith:	grades 4-6
10.	Allen:	grades 1-3
	Windsor Park:	grades 4-6
11.	Furman:	grades 1-3
	Meadowbrook:	grades 4-6
12.	Zavala:	grades 1-3
	Kostoryz:	grades 4-6
13.	Lozano:	grades 1-3
	Carroll Lane:	grades 4-6
14.	Fraser:	grades 1-3
	Lamar:	grades 4-6
15.	Moore:	grades 1-3
	Southgate:	grades 4-6
16.	Calk:	grades 1-3
	Crossley:	grades 4-6

B. Attendance zones for the following schools shall remain unchanged:

Gibson	Menger	Casa Linda
Savage	Central Park	Sam Houston
Oak Park	Fannin	Lexington

C. Attendance zones for Travis Elementary shall remain unchanged, except that 800 Mexican-American students, which number must include all Mexican-American students who reside at the La Armada housing units, shall be assigned as follows:

200	Central Park
100	Menger
100	Kostoryz

100	Gibson
100	Carroll Lane
100	Sanders
50	Los Encinos
50	Houston

D. Attendance zones for Kindergarten and Special Education students shall remain unchanged.

II. Junior High

A. Attendance zones for the following schools shall remain unchanged, except for the deletion of students from the following elementary attendance zones:

Junior High	Elementary
1. Coles	Southgate
2. Hamlin	Fisher
3. Wynn Seale	Furman
4. Baker	Sam Houston
5. Barnes	Austin
6. Browne	Yeager
7. Haas	That portion of the Fraser Elementary attendance zone that lies within the Haas Junior High attendance zone.
8. Cunningham	Prescott
9. Martin	Shaw
10. Cullen Place	That portion of the Montclair Elementary attendance zone bounded by Ocean Drive, west to Fairfield and South Alameda, thence from South Alameda to Ocean Drive;

and the addition of students from the following elementary attendance zones:

Junior High	Elementary
1. Coles	Fisher
2. Hamlin	Southgate
3. Wynn Seale	Sam Houston
4. Baker	Furman
5. Browne	Austin
6. Barnes	Yeager
7. Cunningham	That portion of the Fraser Elementary attendance zone that lies within the Haas Junior High attendance zone.
8. Haas	Prescott
9. Cullen Place	Shaw
10. Martin	That portion of the Montclair Elementary attendance zone bounded by Ocean Drive, west to Fairfield and south Alameda, thence from South Alameda to Ocean Drive.

B. Attendance zones for the following schools shall remain unchanged:

South Park
Shannon
Driscoll

C. Attendance zones for Special Education students shall remain unchanged.

III. Senior High

A. Attendance zones for the following schools shall include all of the following zones as shown on defendants' exhibit 202:

1. Carroll:

	25	46	68	93	97
13	26	47	69	94	108
14	27	57	70	95	109
23	44	59	80	96	
24	45	60	92		

2. King:

9	21	65	106		
10	22	66	107		
11	37	67			
12	38	102			
16	64	105			

3. Miller:

17	40	55	79	84	88
30	41	56	81	85	89
31	53	77	82	86	90
36	54	78	83	87	91

4. Moody:

2	4a	50	62		
3	32	51	63		
3a	48	58			
4	49	61			

5. Ray:

5	28	35	52	75	101
6	29	39	72	76	103
7	33	42	73	99	
8	34	43	74	100	

B. As shown on defendants' exhibit 202, the following zones shall be divided, with students assigned as follows:

1. zone #1: On north side of Sunnybrook (the side nearer to Corpus Christi Bay): King
   On south side of Sunnybrook: Carroll
2. zone #15: To Ray, except that portion bounded by Carver, Greenwood and Kitchen, which portion is assigned to Moody.
3. zone #19: On north side of Gollihar (the side nearer to Corpus Christi Bay): Ray
   On south side of Gollihar: King

4. zone #20: On north side of Gollihar (the side nearer to Corpus Christi Bay): Ray
   On south side of Gollihar: King
5. zone #71: On west side of Shaw: Carroll
   On east side of Shaw: Moody
6. zone #98: On north side of Gollihar (the side nearer to Corpus Christi Bay): Ray
   On south side of Gollihar: King
7. zone #104: On north side of Gregory (the side nearer to Corpus Christi Bay): Ray
   On south side of Gregory: King

C. For all zones listed in section III B, supra, the boundary shall run in a straight line down the middle of the named street.

D. Attendance zones for Special Education students shall remain unchanged.

B. Estimated Cost of Transportation

Although the Government did not make an estimate in its plan of the number of students who would need to be transported, it did estimate the number as 15,000 when the plan was presented to the Corpus Christi School Board. Under the plan adopted by the court this figure would be *reduced* by the number of kindergarten children and by the adoption of a different high school plan. The number would be *increased* by the number of high school students who would need transportation under the court's plan.

These exact numbers are unknown, but 15,000 is a good estimate of the maximum number of students who might need or qualify for transportation. Based on a 72 capacity bus and allowing for 12 students to be standing, a loaded bus could carry 84 students, or 168 on one round trip. While a bus might be able to make more than one round trip along a designated route, it is advisable to assume that it will make only one so that a minimum figure of students transported can be ascertained and the cost maximized. Using these figures, approximately 90 buses would be required to transport 15,000 students. Allowing one bus in reserve for every fifteen buses would yield a total of 96 buses as the maximum necessary.[7]

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7. It should be noted that *even before* the court ordered integration and consequent busing, Mobile (a system of 73,500 students) was already using 207 buses to transport 22,093 students daily for an average round trip of 31 miles; and Charlotte-Mecklenburg (a system of 84,000 students) was busing 23,000 students from kindegarten through high school for an average daily round trip of 15 miles. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. at 29,91 S.Ct. at 1282, 28 L.Ed.2d at 574-575 footnote 11. In Charlotte the District Court found that another 138 buses would be needed to desegregate the system. *Id.* at footnote 12. In Mobile the *average* round trip bus route was 31 miles, and in Charlotte-Mecklenburg it was 15 miles. *Id.* at footnote 11. Assuming that Corpus Christi employed direct shuttles the paired schools which would be the farthest apart are Woodlawn and Austin (round trip 16 miles), and Moore and Southgate (round trip 15½ miles). If the bus route operated through the attendance zone, instead of as a shuttle, the distance would be lengthened. It would have some advantages, however. Children would not have to go to school "A" in order to go to school "B". This would cut down the distance a child would have to walk or ride to transportation, and it would mean that children would not be congregating at the schools in large numbers before school opened. Further, several buses could run along the designated routes so that a child would not be absent if he missed the one shuttle bus. Possible transportation groupings include the attendance zones for the following pairs: 7, 8, and 9; 10, 11, and 14; 2, 3, and 15; 1, 4, 5, and 6; 12, 13, and 16. Other combinations can also be devised.

At the Victoria hearing, while using a different estimate of bus capacity, the school board calculated the cost of acquisition and use of 96 buses at $1,718,756, broken down as follows:

Purchase (@ $8000)	$768,000
Op. Expenses (@ 3501)	336,096
Bond	960
Capital Investment	500,000
Salaries of Maintenance and Admin. Personnel	113,700
	$1,718,756

This figure could be reduced by grants from the State of Texas of $3200 for each bus which qualifies as transporting students who live more than two miles from the school to which they are assigned and for whom public transportation is unavailable. This could be as much as $307,200.

The school district has several options for raising the money necessary to transport those students who qualify for free transportation. Subject to voter approval, the tax base can be broadened or the tax rate can be raised. The school district can work through the county tax office instead of the city office. Funds can be diverted from nonacademic programs. The school district can apply for federal funds under H.E.W.'s Emergency School Assistance Program (Victoria Hearing Transcript pp. 10-57). It may be possible to hire independent contractors to do some or all of the work, or to reach an agreement with the local bus company. Buses can be leased rather than purchased and the Board might wish to use vans (Ford van, Volkswagen bus) instead of the typical school bus on some routes.

Of course, the School Board faces a real limitation on its ability to provide transportation by a circumscribed authority to increase taxes and by the number of buses or other vehicles available. That the school district might not be able to obtain all of the maximum number of buses needed should not, however, cause the court to digress from implementing the most practical plan for achieving a unitary system.

Buses can be used in one of two ways to transport the children safely and effectively, and the better method will vary from pair to pair. Direct "shuttle" routes may be desirable in some instances. In others it may be more effective for buses to follow routes through several school attendance zones picking up students along the route (not necessarily at school), proceed to the paired school for discharge, return through the attendance zones at the other end of the line making pick-ups as they go, and then discharge them at their assigned schools. The process would be reversed in the afternoon.

C. The Modular System

The court recognizes that its plan splits the intermediate module in the 32 paired schools. There are two feasible alternatives to this result and The Board of Trustees of the Corpus Christi Independent School District may use its discretion to adopt either one for any of the paired schools.

First, each one of the paired schools could be treated as a module. Second, the school district could operate the "1-3" school with a primary module or modules, and an intermediate module with one half of the children drawn from each attendance zone in the pair. The "4-6" school

could then operate an intermediate module with one-half of the children drawn from each of the attendance zones in the pair, and an advanced module or modules. The school board may wish to operate all of the paired schools under the court's plan in Section I A, or all under either alternative, or any combination of the three. This decision must be made and announced on or before August 1, 1971; otherwise the court's plan in Section I A will be used.

VI. Conclusion

The court is exceedingly grateful to the members of the Human Relations Committee, the attorneys (Messrs. James DeAnda, Chris Dixie, J. W. Gary, Richard Hall, Eric Nelson and James Wolf), Dr. Dana Williams and the other representatives of the School District, and above all, to the citizens of Corpus Christi for the interest, cooperation and patience they have exhibited throughout the course of this case. For many it has been an unsettling and traumatic experience.

The court cannot promise that all unpleasantness, unease and disappointment has passed. Corpus Christi must now begin the difficult task of adjusting to a change in her schools, and possibly her social fabric, change which is unpopular with many of her citizens. It is doubtful that there exists one person who is pleased with every aspect of the court ordained plan.

The plan is *not* the result of a vendetta against Corpus Christi or of a policy of racism. It is the result of the denial of constitutionally guaranteed equal protection to Anglo, Mexican-American, and Negro parents and students. It is the result of a decision by the School Board

to defend the status quo and abstain from fashioning a remedy. It is the result of decades of insensitivity to the rights of others and the courts' obligation to secure those rights.

The challenge facing Corpus Christi today is to implement this plan even though it may be unpopular, even though it is appealed. This is the highest test of a free people operating within the framework of a constitution. If we fail, these children will confront the same task tomorrow.

The court directs the intervenor Department of Health, Education, and Welfare to give affirmative assistance to the Corpus Christi Independent School District in implementing the court's plan to achieve a unitary school system. This shall include assistance in the initiating and processing of an application for federal funds for transportation and other uses. The Corpus Christi Independent School District is directed to cooperate in these efforts and to apply for such funds as are available.

[7] Because of the emergency nature of this litigation, the parties are ordered, in the event that any of them decide to appeal this judgment, immediately to prosecute such appeal under Rule 2 of the Federal Rules of Appellate Procedure. Pursuant to an order promulgated by the Court of Appeals for the Fifth Circuit on May 26, 1971, the provisions of Rule 4(a), Federal Rules of Appellate Procedure, are suspended and the parties ordered to file any notice of appeal within 15 days of the date of the final judgment, and to file any notice of cross-appeal within five days thereafter; further, the provisions of Rule 31, Federal Rules of Appellate Procedure, are suspended to the extent that the brief of the appellant shall be filed

within 15 days after the date on which the record is filed and the brief of the appellee shall be filed within 10 days after the date on which the brief of appellant is filed; further, no reply brief shall be filed except upon order of the Court of Appeals.

Pursuant to an order promulgated by the Court of Appeals for the Fifth Circuit on May 26, 1971, the provisions of Rule 11 are suspended and the Clerk is ordered to transmit the record in this case to the Court of Appeals within 15 days after the filing of the notice of appeal. The Clerk is further ordered to transmit three legible copies of the record for the use of each of the members of the panel covering all matters pertinent to the issue raised on appeal, including oral or deposition evidence, exhibits, maps, charts, plans, proposed plans, and all such other matters as are relevant to the issues presented.

This opinion and the final judgment to be entered immediately will not be stayed by this court pending any such appeal.

This case shall remain on the docket of this court until the court is satisfied that a unitary school system has been adopted and put into effect.

The Clerk is directed to file this Memorandum and the Final Judgment entered this date and provide the attorneys of record with true copies thereof.

Done at Houston, Texas, this 2nd day of July, 1971.

/s/ WOODROW SEALS
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

JOSE CISNEROS, ET AL
v.
CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT, ET AL

Civil Action No. 68-C-95

FINAL JUDGMENT

The court, having this day by written opinion determined all the issues in controversy in this cause of action, and being of the opinion that the student assignment plans submitted by the Corpus Christi Independent School District do not meet the constitutional requirements of a unitary school system; and having considered the pleadings, evidence and arguments of all parties, and being of the opinion that the student assignment plans promulgated by the court in its Memorandum Opinion of this date does achieve a unitary school system that is reasonable, practical and feasible in assignment of students, does hereby ORDER, ADJUDGE and DECREE that the student assignment plans announced and set forth in the court's Memorandum Opinion of this date shall be put into effect on the first day and thereafter of the fall, 1971, school term.

Because of the emergency nature of this litigation, the parties are ordered, in the event that any of them decide to appeal this judgment, immediately to prosecute such appeal under Rule 2 of the Federal Rules of Appellate Procedure. Pursuant to an order promulgated by the Court

of Appeals for the Fifth Circuit on May 26, 1971, the provisions of Rule 4(a), Federal Rules of Appellate Procedure, as to the time for filing notice of appeal, are suspended and the parties ordered to file any notice of appeal within 15 days of the date of this Final Judgment, and to file any notice of cross-appeal within five days thereafter; further, the provisions of Rule 31, Federal Rules of Appellate Procedure, are suspended to the extent that the brief of the appellant shall be filed within 15 days after the date on which the record is filed and the brief of the appellee shall be filed within 10 days after the date on which the brief of appellant is filed; further, no reply brief shall be filed except upon order of the Court of Appeals.

Pursuant to an order promulgated by the Court of Appeals for the Fifth Circuit on May 26, 1971, the provisions of Rule 11 are suspended and the Clerk is ordered to transmit the record in this case to the Court of Appeals within 15 days after the filing of the notice of appeal. The Clerk is further ordered to transmit three legible copies of the record for the use of each of the members of the panel covering all matters pertinent to the issue raised on the appeal including oral or deposition evidence, exhibits, maps, charts, plans, proposed plans, and all such other matters as are relevant to the issues presented.

The Corpus Christi Independent School District is further ordered to file with this court and with the Human Relations Committee on or before October 15, 1971, and again on or before December 15, 1971, and again on or before May 15, 1972, and for each six months after May 15, 1972, a report detailing the results of the implementation of the plans promulgated herein.

The report shall set forth the following information as a minimum:

I.

(a) The number of students by ethnic background enrolled in the school district;

(b) The number of students by ethnic background enrolled in each school of the district;

(c) The number of students by ethnic background enrolled in each classroom in each of the schools in the district.

II.

(a) The number of full time teachers by ethnic background in the district;

(b) The number of full time teachers by ethnic background in each school in the district;

(c) The number of part time teachers and teacher aides by ethnic background in the district;

(d) The number of part time teachers and teacher aides by ethnic background in each school in the district.

III.

Describe the requests and the results which have accrued, by ethnic background, under the ethnic ratio transfer policy adopted by the school board on August 30, 1970, and set forth in Defendants' Exhibit 216.

IV.

State the number of inter-district transfers since the opening of school, or the filing of the latest report, the

ethnic background of the students, and the school district or which transfers were allowed or from which transfers were permitted.

V.

State whether the transportation system, if any, in the district carries Anglo, Mexican-American and Negro students daily on the same vehicles.

VI.

State whether all facilities such as gymnasiums, auditoriums, and cafeterias, and all co-curricular activities are open to all students regardless of ethnic background.

VII.

Give brief description of any present or proposed construction or expansion of facilities including location and projected cost.

VIII.

State whether the school district has sold or abandoned any school facility, equipment, or supplies having a total value in excess of five hundred dollars since the opening of school or the date of the last report.

IX.

(a) State the number of principals, assistant principals, librarians, other administrative personnel and employees, by job title and by ethnic background, in the district;

(b) State the number of principals, assistant principals, librarians, other administrative personnel and employees,

by job title and by ethnic background, in each school or facility in the district.

X.

State whether the Human Relations Committee has submitted reports or recommendations to the Board of Trustees, and the number and disposition of such reports or recommendations.

XI.

State any other matter which the Board of Trustees believe should be brought to the attention of this court.

From the date of this order the Human Relations Committee shall be composed of eighteen members. Plaintiffs and defendants, through their attorneys shall each select three persons, including one Anglo-American, one Mexican-American and one Negro-American, which nominees shall be added to the membership of the Human Relations Committee by filing the names with the Clerk of the Court in Corpus Christi.

It is the further order of this court that the Department of Health, Education, and Welfare shall give affirmative assistance to the Corpus Christi Independent School District in implementing the court's plan to achieve a unitary school system, including, but not limited to, assistance in the initiating and processing of applications for federal funds for transportation and other uses. It is further ordered that the Corpus Christi Independent School District cooperate in these efforts and to apply for such funds as are available.

This Final Judgment is to be entered immediately and will not be stayed by this court pending appeal.

This case shall remain on the docket of this court until the court is satisfied that a unitary school system has been adopted and put into effect.

All taxable costs herein are assessed against the Defendant Corpus Christi Independent School District.

The Clerk is directed to file this final judgment and provide the attorneys of record with true copies thereof.

Done at Houston, Texas, this 2nd day of July, 1971.

WOODROW SEALS
Woodrow Seals
United States District Judge

OPINION ORDER OF MR. JUSTICE BLACK

SUPREME COURT OF THE UNITED STATES

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT ET AL

v.

JOSE CISNEROS, ET AL.

APPLICATION FOR REINSTATEMENT OF STAY ORDERED BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

[August 19, 1971]

MR. JUSTICE BLACK, Circuit Justice.

The district judge in this case ordered the Corpus Christi Independent School District to stop alleged historical practices of discrimination against school children on the basis of race or color. He directed how this was to be accomplished, saying at the same time that he would grant no stays of his order. The school district asked the court to stay its order and a stay was granted by a different district judge who had been assigned to hear the application. The plaintiffs, parents of the students allegedly discriminated against, then asked the United States Court of Appeals for the Fifth Circuit to vacate the stay. A panel of two Circuit Court judges did vacate the stay. The school district then applied to me as a single Justice to reinstate the District Court's stay. The Solicitor General of the United States has joined in requesting me as a single Justice to reinstate

that stay. If I reinstate the stay, the District Court's order will not go into effect until the Fifth Circuit or this Court has had an opportunity to pass on it.

It is apparent that this case is in an undesirable state of confusion and presents questions not heretofore passed on by the full Court, but which should be. Under these circumstances, which present a very anomalous, new, and confusing situation, I decline as a single Justice to upset the District Court's stay and, therefore, I reinstate it without expressing any view as to the wisdom or propriety of the Solicitor General's position. The stay will be reinstated pending action on the merits in the Fifth Circuit or action by the full Court.

DENIAL OF EN BANC HEARING

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2397

JOSE CISNEROS, ET AL,
Plaintiffs-Appellees-Cross Appellants,
versus
CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT, ET AL,
Defendants-Appellants-Cross Appellees.

Appeals from the United States District Court for the Southern District of Texas.

ON SUGGESTION FOR HEARING EN BANC

(October 7, 1971)

Before GEWIN, GOLDBERG and DYER,
Circuit Judges.

BY THE COURT: The Court having been polled at the request of one of the members of the Court on hearing en banc and a majority of the Circuit Judges who are in regular active service not having voted in

favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Hearing En Banc is DENIED.

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM and RONEY, Circuit Judges.

BELL, Circuit Judge, DISSENTING: I dissent with regret. I think that it is a serious error in judgment for the court to decline to hear this case en banc. It presents some quality of justice considerations which are of particular importance in the time of stress now existing as school boards and courts seek appropriate ways and means to desegregate urban school systems. But of more importance, it presents questions of first impression in this court in the field of a non-dual system and non-de jure segregation. We have here a Mexican-American and Anglo segregation problem in a school district where school segregation between the two groups has never been required by law. Indeed, we have a school district in which every school was integrated as between the two groups at the time of the decision in *Brown v. Board of Education*, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873.[1] The order of the district court setting forth the

1. The rights of the Negro plaintiffs are caught up in the controversy as to the legal status of the Mexican-American and Anglo students in the system, and to date they have not been accorded relief although their status rests completely on an admitted dual school premise. The United States as plaintiff-intervenor suggests remand to the district court for further evidentiary hearings regarding discrimination against Mexican-Americans and also to consider the scope of the remedy on the basis of adjusting it to the scope of such discrimination as is found. However, immediate relief is urged for the Negro students.

remedy required has been stayed by Justice Black and the matter is presently pending in this court on the merits. A copy of Justice Black's order is attached as Appendix A. This stay is based on a view that the circumstances of the case ". . . present a very anomalous, new and confusing situation."

A. *Quality of Justice Considerations*

The school board moved to have this matter heard by the court en banc. The following facts demonstrate to me that justice would be better served from the standpoint of the school board, and derivatively the taxpayers and citizens of the Corpus Christi school district, believing, when the final order comes, that the matter has received the reasoned attention of the federal court system. This is not to say that the panel hearing this matter will not give it reasoned attention; it is to say that prior events might cause the school district, as it apparently has, to seek a broader forum. The following outline should suffice to make this point:

(1) Suit was filed on July 22, 1968, by Negro and Mexican-American plaintiffs. They alleged that Negro students had been segregated by law prior to 1954. As to Mexican-American students, and Negro students after 1954, it was alleged that they were segregated through the establishment of school boundary lines by the school district. The schools maintained for Negro students prior to 1954 had been "phased out." It was further alleged that segregation existed in the form of requiring Negro and Mexican-American students to attend schools together while Anglo students attended predominantly Anglo schools. This was referred to in the complaint as de facto segregation.

The prayer for relief sought no racial balance and was in fact adjusted to the discrimination claimed. Plaintiffs sought an order to prevent discrimination on the basis of race, color or national origin through the utilization of plant, equipment and curricula, disproportionate assignment of teachers and staff, and in school building construction. They sought to enjoin defendants from establishing and maintaining school zones or boundary lines that discriminate. This prayer was expanded in a proposed pretrial order dated May 14, 1970 to require defendants to fully integrate the school system. No distinction was drawn between Negro and Mexican-American students.

The facts were that before 1954, the district was comprised of 39 schools, 3 for Negro students and 36 for the remaining students—each of the 36 having student bodies comprised of Anglo and Mexican-American students. It appears that by 1969, the demography of the system was such that one high school out of five was predominantly Mexican-American although there were some Negro and Anglo students in attendance (M-A 1363, N-168, A-58). There were 12 junior high schools and four of these were predominantly Mexican-American although each had a small number of Negro and Anglo students. There were 43 elementary schools and 16 of these were predominantly Mexican-American.

The system-wide racial ratio in 1969 was as follows out of a total of 46,023 students: Elementary — 50.78%-M-A, 43.44%-A, 5.78%-N; Junior High — 46.71%-M-A, 48.01%-A, 5.28%-N; High — 38.87%-M-A, 56.42%-A, 4.71%-N. In 1969 there were 21,806 Anglos, 21,719 Mexican-Americans and 2,475 Negro students in the sys-

tem. This was up from 13,668 Anglos, 11,883 Mexican-American and 1,342 Negro students in 1954. These statistics are based on using a school census of Spanish and Anglo surnames. (No comment is necessary on the unreliability of such an approach.)

(2) On June 4, 1970, the district court entered a "partial final judgment" enjoining defendants from discriminating on the basis of race, color or ethnic origin in the assignment of students, teachers and staff to the various schools of the district, and requiring certain affirmative action including a desegregation plan. This judgment was based on an opinion rendered on the same day, now reported as *Cisneros v. Corpus Christi Independent School District,* S.D. Texas, 1970, 324 F. Supp. 599. The court concluded that the Mexican-Americans had been relegated to dual school system status. At another point the court referred to the school system as being segregated and dual with "its . . . real roots in the minds of men" in that the school district failed ". . . to anticipate and correct the racial imbalance that was developing."

The only findings pointing to affirmative discrimination relate to the drawing of boundary lines in a total of two schools out of 61. Other discrimination found to exist falls in the category of increasing racial and ethnic imbalance through the location of new buildings (two), and through renovating existing buildings (four), in recent years on a neighborhood basis. The court also found discrimination in allowing students to transfer under "Student Emergency Transfer Applications." This involved a total of 200 transfers. Discrimination was also found with respect to one school in the use of an option assignment plan, and in failing to employ what the district court con-

sidered to be a sufficient number of Mexican-American teachers and staff. The last finding of discrimination is based on the failure of the school district to adopt a majority to minority transfer rule, a concept of recent origin in dual school system integration techniques.

At this point, June 4, 1970, the district entered the necessary certificate for an interlocutory appeal under 28 USCA, § 1292(b).

(3) On July 10, 1970, this court denied the interlocutory appeal in a two judge order.

(4) On July 13, 1970, this court denied a stay of the district court order in a two judge order.

(5) On July 2, 1971, after an extended hearing, the district court entered a comprehensive student assignment order requiring the district to transport 15,000 students out of their former places of school assignment. The district had a total of nine buses transporting 400 students at the time. The district court computed the number of buses needed on the basis of two round trips daily of buses having a seating capacity of 72 students and with 12 extra students to stand on each trip. This came to a need of 96 buses costing $1.7 million. The district court was aware of the difficulty if not the impossibility of obtaining the necessary funds and of the delay in procuring the buses even if the funds could be first obtained. Nevertheless, the court deemed these difficulties insufficient in face of the need, as the court saw it, to disestablish the "neighborhood school concept of the system" and to distribute the "burden of integration" throughout the system. After decreeing that no school could have less than an 80-20 racial ratio, Mexican-American and Negro as one

group and Anglo as the other, the court ruled that no stay would be granted pending appeal. As a preamble to this order, the district court had recited the fact that this court had denied an interlocutory appeal although such a course had been suggested by the district court.

The district judge in charge then left the district. This left the school board in an unfortunate position, given the denial of the stay and having in mind the uncertainty of funds and buses to carry out the order.

(6) Despite this, the school district sought a stay in the district court and the matter was assigned by the Chief Judge of the district to an available district judge who on July 16, 1971, granted a stay as to the remedy insofar as additional time was needed to obtain funds, buses, and to accomplish the remodeling of buildings, changes in curriculum, library facilities, and teaching assignments, all necessary under the order.

By a supplemental order dated July 17, 1971, the district court made it clear that the stay was only as to Mexican-American and Anglo students affected by the order of July 2, 1971.

(7) This court then vacated the order of the district court which had granted the partial stay. (Two judge order dated August 5, 1971).

This order had the effect of substantially mooting the appeal from the standpoint of remedy since it meant that the buses had to be immediately purchased and the 15,000 students reassigned and transported.

(8) On August 19, 1971, Justice Black reinstated the partial stay which had been granted in the district court.

(9) On August 23, 1971, the district court broadened its stay to include Negro students as well as Anglo and Mexican-Americans. See footnote 1, supra.

(10) On August 23, 1971, the appeal of the school district was set for hearing before a panel of this court on September 8, 1971.

(11) On August 25, 1971, the school district moved to have the case considered en banc by this court.

While not entitled to such consideration as a matter of denial of procedural due process, it is apparent why the school district would want to avail itself of the rules of this court as to en banc hearings so as to have a broader forum, given the denial of the interlocutory appeal presenting a question of first impression and particularly given the effective mooting of a large portion of the appeal by vacating the stay of the district court. Without more, however, this would probably not warrant en banc consideration but there is more.

Substantial questions of first impression are presented.

Justice Black noted that this case presented questions not heretofore passed on by the Supreme Court.[2] These questions are new and have not been passed on by this court.

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2. See *Gomperts v. Chase*, No. A-245 (September 10, 1971), where Justice Douglas in denying a stay to plaintiffs in a de facto school situation case noted that ". . . the precise contours of de jure segregation have not been drawn by the Court. Historically that has only been where ". . . segregation was a mandate by the legislature, carried into effect by a school board, whereby students were assigned to schools solely by race."

There are in fact two new questions. First, what is to be the test in determining the question of discrimination vel non in a non-dual school system, i.e., one which has never been segregated by law? This question is confused by the fetish to give names to legal doctrines—here de jure-de facto. We generally refer to de jure school segregation as that where students are or were segregated pursuant to state statute. The district court found some discrimination in a de facto school situation (as to Mexican-Americans), and leaped across the factual chasm to find de jure status. A de jure remedy was then applied. It would seem that the more appropriate approach would be to determine in the first instance whether and to what extent discrimination exists.

If discrimination is found, then the second question is remedy. Should the remedy be commensurate with the particular determination found to the end of eliminating that discrimination, or should the entire school system be reconstituted notwithstanding the degree of discrimination. To put the question simply, should the school system of a large city be reconstituted in its entirety although the discrimination may have been restricted to one or only a few schools? Stated differently, do isolated instances of discrimination taint the entire system?

These are important questions. Many school children are involved. We resolved en banc most of the questions involved in desegregating de jure systems. *Singleton v. Jackson Municipal Separate School District,* 5 Cir., 1969, 419 F.2d 1211. This proved to be an effective approach in an area of law much in the public interest and involving one of our most important social institutions—public schools. We should do the same now that new questions involving non-dual systems are presented.

Moreover, under the teaching of *Swann v. Charlotte-Mechlenburg Board of Education*, 1971 402 U.S. ____, S.Ct. ____, 28 L.Ed.2d 554, there is also the question in this case as to whether the remedy may include an obligation to continuously reconstitute a school system where non-discriminatory resegregation occurs due entirely to changes in residential patterns. *Swann* would seem to teach otherwise. 402 U.S. at ____, ____ S.Ct. at ____, 28 L.Ed.2d at 575.

In the interest of stability in the field of public education, I would meet and resolve these questions now as a whole court.

APPENDIX A

SUPREME COURT OF THE UNITED STATES CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT et al v. JOSE CISNEROS et al.

Application For Reinstatement Of Stay Ordered By The United States District Court For The Southern District Of Texas

[August 19, 1971]

Mr. Justice Black, Circuit Justice.

The district judge in this case ordered the Corpus Christi Independent School District to stop alleged historical practices of discrimination against school children on the basis of race or color. He directed how this was to be accomplished, saying at the same time that he would grant

no stays of his order. The school district asked the court to stay its order and a stay was granted by a different district judge who had been assigned to hear the application. The plaintiffs, parents of the students allegedly discriminated against, then asked the United States Court of Appeals for the Fifth Circuit to vacate the stay. A panel of two Circuit Court judges did vacate the stay. The school district then applied to me as a single Justice to reinstate the District Court's stay. The Solicitor General of the United States has joined in requesting me as a single Justice to reinstate that stay. If I reinstate the stay, the District Court's order will not go into effect until the Fifth Circuit or this Court has had an opportunity to pass on it.

It is apparent that this case is in an undesirable state of confusion and presents questions not heretofore passed on by the full Court, but which should be. Under these circumstances, which present a very anomalous, new, and confusing situation, I decline as a single Justice to upset the District Court's stay and, therefore, I reinstate it without expressing any view as to the wisdom or propriety of the Solicitor General's position. The stay will be reinstated pending action on the merits in the Fifth Circuit or action by the full Court.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office Of The Clerk

Edward W. Wadsworth
Clerk

Rm. 408-400 Royal St.
New Orleans, La. 70130

February 7, 1972

TO ALL COUNSEL OF RECORD

No. 71-2397—Cisneros, et al v. Corpus Christi Independent School District, et al

Gentlemen:

I am directed by the court to advise that the decision in the above referenced case is being withheld pending a decision of the Supreme Court of the United States.

As soon as a decision is rendered in the above cause, a copy of the printed opinion will be forwarded to you.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By: AUDREY D. GLYNN
Audrey D. Glynn
Deputy Clerk

/adg

Messrs. Richard A. Hall
J.W. Gary
Messrs. Donald L. Howell
David T. Searls
Hon. David L. Norman
Mr. Scott T. Cook
Messrs. Chris Dixie
James P. Wolf
Mr. James DeAnda
Mr. Charles Stephen Ralston
Mr. Mario Obledo
Mr. Edward Idar, Jr.

OPINION ON MERITS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2397

JOSE CISNEROS, ET AL.,
Plaintiffs-Appellees,

versus

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

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(August 2, 1972)

Before BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM, and RONEY, Circuit Judges.

DYER, Circuit Judge: In this desegregation class action brought against the Corpus Christi Independent

School District and its Board of Trustees,[1] the district court held that the city's mexican-american and black children were segregated from anglo children in the public school system as a result of official action of the Board in violation of the mandate of *Brown v. Board of Education,* 1954, 347 U.S. 483. *Cisneros v. Corpus Christi Independent School District,* S.D. Texas 1970, 324 F. Supp. 599 (*Cisneros I*). The court ordered an immediate reassignment of the District's teaching staff, consideration of the achievement or preservation of a "reasonable mixture" of mexican-american and black students with other students in construction of new schools, the filing of a revised student assignment plan for the purpose of creating "a unitary school system", and the creation of a Human Relations Advisory committee. Subsequently, after extended hearings, the court formulated and ordered into effect a student assignment plan to achieve integration of the school system in accordance with contemporary consitutional guidelines. *Cisneros v. Corpus Christi Independent School District,* S.D. Texas 1971, 330 F.Supp. 1377 (*Cisneros II*). *See Swann v. Charlotte-Mecklenburg Board of Education,* 1971, 402 U.S. 1. This order was stayed by Mr. Justice Black, sitting as Circuit Justice, pending consideration of the merits of the Board's appeal by this Court.[2]

This is a novel school desegregation case. A large number of mexican-american children attend the public

1. Defendants in the case are the School District, the Superintendent of the District, and the President and Members of the Board of Trustees of the District. In Texas, the Board of Trustees is charged with the operation of free public education systems and it is primarily the actions and policies of the Board to which we refer in this appeal.

2. 1971, 404 U.S. 1211.

schools of Corpus Christi. Although they are now and have been historically separated in fact from anglos in the schools of the city, this separation has never had a statutory origin. Therefore, unlike cases involving the traditional black-white dual systems, the question is whether the segregation of mexican-american children who are not the victims of statutorily mandated segregation is constitutionally impermissible. We hold that it is, and affirm the district court's finding that the mexican-american children of Corpus Christi are segregated in violation of the Constitution. For reasons hereinafter explicated, however, we disagree with the remedy prescribed by the district court and require it to be modified.

Although we are faced with a tri-ethnic school population, the determination below that the relatively few black students in the school system were segregated contrary to law is basically uncontested in this appeal. The district court must, however, also reconsider the remedy with regard to black students in accordance with this opinion.

The Corpus Christi Independent School District encompasses the metropolitan area of Corpus Christi, Texas. The district is crescent-shaped extending approximately 11 miles in length from its southeast to its northwest corner, and varies in width from three to four miles. Following the curvatures of Corpus Christi and Nueces Bays, it is bounded by water on its north, east, and south sides.

In the school year 1969-70, upon which the statistics in this case are based,[3] there were 46,023 scholastics in

3. Plaintiff's Exhibit 3-A and the defendant's Exhibit 4 contain descriptions of the ethnic distribution of students and teachers within the school system. The trial court found these exhibits to reflect substantially the same information. Our numerical and statistical evalua-

the public school system. In terms of total ethnic distribution, 47.4% of the school children were anglo, 47.2% mexican-american, and 5.4% black. There are 61 public schools in the school system, 45 elementary schools, 12 junior highs, and 5 senior highs. In terms of ethnic distribution by grade level, of the 24,389 elementary students, 43.4% were anglo, 50.8% mexican-american, and 5.7% black. Of the 11,793 junior high students, 48% were anglo, 46.7% mexican-american, and 5.25% black. Of the 9841 senior high school students, 56.4% were anglo, 38.9% were mexican-american and 4.6% black.

The ethnic distribution figures further show that in 1969-70, one third of the district's mexican-american high school students attended Moody High School, the enrollment of which was 97% mexican-american and black (11% black). Another one-third of the mexican-american high school students attend Miller High, which is 80% mexican-american and black (14% black). One-third of the district's anglo high school students attend King High, the enrollment of which is over 90% Anglo. Another 57% of the anglo high school students attend either Carroll or Ray high schools, each of which is over 75% anglo.

In the junior high schools, approximately 61% of the mexican-american students attend three junior highs which are over 90% mexican-american in enrollment. Over 50% of the anglo junior high students attend junior highs that are over 90% anglo in enrollment. Of the 24,389

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tions are taken from defendant's Exhibit 4, reproduced in *Cisneros I*, 324 F.Supp. 599, 609. While we are aware that these enrollment figures were arrived at by a process using a school census of spanish and anglo surnames, we are assured by the parties upon argument that these figures are substantially accurate and realistically reflect enrollment patterns in the system.

elementary level students, approximately 10,178 mexican-americans and blacks (1250 blacks) attend elementary schools in which over 90% of the enrollment is non-anglo-american. Approximately 6561 anglo elementary studen's attend schools in which the non-anglo-american enrollment is less than 20%. The enrollment in eleven of the 45 elementary schools in the school system is over 90% mexican-american, over 75% mexican-american in three others, over 90% mexican-american and black in four other schools, over 90% anglo in six schools, and over 80% anglo in nine other schools.[4]

At the elementary level alone, 29 of the 45 schools, or almost a full two-thirds, are clearly identifiable as consisting of one ethnic derivation. The same total figure comparisons can roughly be made with regard to the junior and senior high schools of the school system.

Highly relevant to these enrollment statistics are the historic and established residential patterns of the city. There is today and has traditionally been substantial residential concentration by ethnic groups in Corpus Christi. The mexican-american and black population of the district is concentrated in a narrow area that comprises the middle part of the district, running roughly southwest to northeast, bordered on the south side by a major city artery, Ayres Street. This residential concentration is referred to throughout the litigation as the mexican "corridor". To the south of Ayres Street, as the corridor boundary, the relative number of mexican-americans and blacks, as opposed to anglos, drops sharply. The southern part of the district exists almost exclusively as an anglo residential area.

4. See *Cisneros I*, 324 F.Supp. at 608-612, n. 12.

Since before 1938, the district has assigned anglo children to schools according to a neighborhood school plan composed of geographic attendance zones. Students of mexican-american descent have always been classified as anglo by the school board. Generally, students attend school at all levels at the school nearest their home. Thus, the imposition of neighborhood school zones over the patern of marked residential segregation in Corpus Christi has, inevitably, resulted in mexican-american and anglo children being substantially separated in the public schools.

The city's high schools provide a striking example. The first public high school built in the district still in existence is Miller High, built in 1928, and rebuilt in 1966. It is located at the north end of the mexican "corridor", although not in the area of highest mexican-american concentration. Its attendance zone until 1968 comprised all of the northern part of the school district. In 1949, its enrollment was 78% anglo, 22% mexican-american. In 1950, Ray High School was built approximately in the center of the school district, to the southeast of the Ayres Street artery which has served as the "corridor" boundary. It opened with an enrollment that was 87% anglo. A significant number of anglo students was then withdrawn from Miller into Ray High School. In 1958, Carroll was opened in the south central part of the district, again south of Ayres street, and served an attendance zone that extended beyond Ayres north into the heart of the mexican-american corridor. It opened, however, as a 78% anglo school. While Ray remained fairly constant at its 87% anglo enrollment figure, Miller now had a majority of mexican-american students. In 1965, King High School was opened in the southernmost corner of the district, with an enrollment that was 95%

anglo (90% in 1969-70). By this time Miller High had become 71% mexican-american, and 8% black.

In 1968, Moody High School was opened in the heart of the mexican-american corridor as a 96% mexican-american-black school (11% black). Its southernmost boundary was Ayres street. Its attendance zone encompassed the great majority of the mexican-american concentration of the corridor, sequestering all of that area north of Ayres that once was included in the Carroll attendance zone. Whereas the students that lived in the corridor had formerly been divided in the Carroll, Miller and Ray schools, their inclusion in the Moody zone now locked over two-thirds of the city's mexican-american high school students into two high schools located in the non-anglo residential area of the city each of which was clearly identifiable as a minority group high school. Importantly, the drawing of the new boundary lines after the building of Moody, in furtherance of the neighborhood school concept, with its withdrawal of significant numbers of mexican-american and black students from Carroll, Ray, and Miller into Moody, decreased the degree of integration in those schools, increased their reflected ethnic identity, and further locked the residents of the corridor into their racially and ethnically homogeneous high schools.

With this background we briefly trace the protracted litigation in this case. The suit was filed on July 22, 1968, by the parents of black and mexican-american children alleging that the local school authorities had operated the schools of the district in a discriminatory manner which resulted in the unlawful segregation of black and mexican-american students from whites. In *Cisneros I, supra,* June 4, 1970, the court found that de jure

segregation existed in Corpus Christi. The court held that mexican-americans constituted an identifiable, ethnic-minority group entitled to the Fourteenth Amendment guarantee of equality in public education, and that both mexican-americans and blacks were unconstitutionally segregated in the public schools of Corpus Christi, as a result of official action by the defendant Board.

In *Cisneros II*, July 2, 1971, a court-designed student assignment plan was promulgated, based upon various parts of plans submitted by the District and the Department of Health, Education and Welfare. The court directed that the plan be implemented by the commencement of the fall, 1972 school term. The plan, in essence, required the pairing of elementary schools in two levels, a complete revision of high school attendance zones, and further reassignment of specific groups of school children throughout the system to aid in the dismantling of identifiable ethnic group schools. The district court found that extensive busing would be required to implement the new plan, as it contemplated the transportation of approximately 15,000 school children at an initial estimated cost ranging from $1,400,000 to $1,700,000. The school District then had a total of only nine buses transporting 400 students. On July 13, 1971, the Board moved for a stay of the July 2 order insofar as it concerned mexican-american desegregation. On July 16, 1971, a different district judge granted the partial stay. That stay was vacated by an order of this Court on August 5, 1971, but was reinstated by Mr. Justice Black on August 19, 1971.[5] This appeal followed.

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5. *See* note 2 *supra*. On August 23, 1971, the district judge who had granted the partial stay, granted a stay of the July 2 order of *Cisneros II* in regard to black students coextensive with his previously entered stay for mexican-american students.

The district court's finding that the black students were segregated as a result of constitutionally impermissible state action was not contested at argument. It is clearly supported by the record. The stay order of the district court, entered August 23, 1971 against that portion of the district court plan requiring the immediate integration of the black plaintiffs in this case must be vacated. *See Cisneros I,* 324 F.Supp. at 615, and n. 46.

We now turn to the main thrust of this appeal. Although *Brown* arose in the context of segregation by state law, often termed "classical or historical *de jure* segregation," *see Gomperts v. Chase,* 1971, 404 U.S. 1237, 1238 (Douglas, Circuit Justice), we think it clear today beyond peradventure that the contour of unlawful segregation extends beyond statutority mandated segregation to include the actions and policies of school authorities which deny to students equal protection of the laws by separating them ethnically and racially in public schools. *See Cooper v. Aaron,* 1958, 358 U.S. 1, 17 and cited cases: *Keyes v. School District No. 1, Denver Colo.,* 10 Cir. 1971, 445 F.2d 990, 999, *cert. granted,* 1972, No. 71-507, 404 U.S. 1036; *Davis v. School District of Pontiac,* 6 Cir. 1971, 443 F.2d 573, *cert. denied,* 1972, 404 U.S. 913; *Bradley v. Milliken,* E.D. Mich. 1971, 338 F.Supp. 582; *Johnson v. San Francisco,* N.D. Cal. 1971, ___ F.Supp. ___. Such actions are "state action" for the purposes of the Fourteenth Amendment, and result in dual school systems that cannot be somehow less odious because they do not flow from a statutory source. The imprimatur of the state is no less visible. The continuing attempt to cast segregation that results from such action as de facto and beyond the power of the court to rectify is no longer entitled to serious consideration.

Thus, we discard the anodyne dichotomy of classical de facto and de jure segregation. We can find no support for the view that the Constitution should be applied antithetically to children in the north and south, or to mexican-americans *vis-a-vis* anglos simply because of the adventitious circumstance of their origin or the happenstance of locality. Time has proven the soundness of the view expressed in dissent in *Jefferson II*, which, in focusing upon de facto dicta in *Jefferson I*,[6] said:

> The Negro children in Cleveland, Chicago, Los Angeles, Boston, New York, or any other area of the nation which the opinion classifies under de facto segregation, would receive little comfort from the assertion that the racial make-up of their school system does not violate their constitutional rights because they were born into a de facto society, while the exact same racial make-up of the school system in the 17 Southern and border states violates the constitutional rights of their counterparts, or even their blood brothers, because they were born into a de jure society. All children everywhere in the nation are protected by the Constitution, and treatment which violates their constitutional rights in one area, also violates such constitutional rights in another area.

Jefferson II at 397.

The Board, however, conceding the existence of severe racial and ethnic separation in the Corpus Christi public schools, nevertheless maintains that another type of de facto segregation exists here, arguing that this separa-

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6. *United States v. Jefferson County Board of Education*, 5 Cir. 1966, 372 F.2d 836 *(Jefferson I)*, *aff'd en banc* 1967, 380 F.2d 385 *(Jefferson II)*.

tion is not a result of school board actions and policies but rather of housing patterns, geographic fluctuations, and other social and economic factors prevalent in the city. Moreover, it urges, even if the imbalance could be traced to Board action, it does not fall within constitutional proscription because it has not acted with a discriminatory motive or purpose.

We must also reject this type of continued meaningless use of de facto and de jure nomenclature to attempt to establish a kind of ethnic and racial separation of students in public schools that federal courts are powerless to remedy. Such attempts are confusing and unnecessary. The decision in *Brown* is the clear embodiment of the legal framework for the resolution of these important issues.

Brown prohibits segregation in public schools that is a result of state action. It requires simply the making of two distinct factual determinations to support a finding of unlawful segregation. First, a denial of equal educational opportunity must be found to exist, defined as racial or ethnic segregation. Secondly, this segregation must be the result of state action.

We need not define the quantity of state action or the severity of the segregation necessary to sustain a constitutional violation. These factual determinations are better dealt with on a case by case basis. We need only find a real and significant relationship, in terms of cause and effect, between state action and the denial of educational opportunity occasioned by the racial and ethnic separation of public school students.

We affirm the finding of the district court that action by the school district here has, in terms of cause and

effect, resulted in a severely segregated school system in Corpus Christi. We need find nothing more. Discriminatory motive and purpose, while they may reinforce a finding of effective segregation, are not necessary ingredients of constitutional violations in the field of public education. We therefore hold that the racial and ethnic segregation that exists in the Corpus Christi school system is unconstitutional—not de facto, not de jure, but unconstitutional.

In limine, we note that there is no serious challenge to the district court's finding that the mexican-americans in the Corpus Christi school system are an identifiable, ethnic-minority class entitled to the equal protection guarantee of the Fourteenth Amendment. *Hernandez v. Texas*, 1954, 347 U.S. 475, 477-78. See *Hirabayashi v. United States*, 1943, 320 U.S. 81, 100; *Yick Wo v. Hopkins*, 1885, 118 U.S. 356, 369. The Board does contend, however, that segregation of mexican-american children in Corpus Christi is not a result of Board action.

The explicit holding of *Cisneros I*, which we now affirm, was that actions and policies of the Board, had, in terms of their actual effect, either created or maintained racial and ethnic segregation in the public schools of Corpus Christi. The district court found that

> . . . [A]dministrative decision by the school board in drawing boundaries, locating new schools, building new schools and renovating old schools in the predominantly Negro and Mexican parts of town, in providing an elastic and flexible subjective, transfer system that resulted in some Anglo children being allowed to avoid the ghetto, or "corridor" schools, by bussing some students, by providing one or more optional transfer zones which resulted in Anglos be-

> ing able to avoid Negro and Mexican-American schools, not allowing Mexican-Americans or Negroes the option of going to Anglo schools, by spending extraordinarily large sums of money which resulted in intensifying and perpetuating a segregated, dual school system, by assigning Negro and Mexican-American teachers in disparate ratios to these segregated schools, and further failing to employ a sufficient number of Negro and Mexican-American school teachers, and failing to provide a majority-to-minority transfer rule, were, regardless of all explanations and regardless of all expressions of good intentions, calculated to, and did, maintain and promote a dual school system.

Id. at 617-620. Each of these findings is clearly supported by the record. But in our view the use of the neighborhood school plan is the direct and effective cause of segregation in the schools of the city.

Here, the Board, by a rigid superimposition of a neighborhood school plan upon the historic pattern of marked residential segregation that existed in Corpus Christi equated the residential homogeny to ethnic and racial homogeny in the public school system, producing inevitable segregation. That there was an absence of state action involved in creating the city's residential patterns is of no significance. The Board imposed a neighborhood school plan, *ab initio,* upon a clear and established pattern of residential segregation in the face of an obvious and inevitable result.

We have considered the Board's claim that its neighborhood school plan was established on racially or ethnically neutral criteria and impartially administered, and is therefore not beyond the pale. This contention, that treatment

of mexican-americans the same as anglos lends a patina of non-segregated respectability to the system is, when analyzed, not as pristine as it appears. The Supreme Court made it plain in *Swann* that

> An assignment plan is not acceptable simply because it appears to be neutral; such a plan may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a "loaded game board," affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments. 402 U.S. at 28.

The Board nevertheless argues that unlawful segregation in the constitutional sense cannot exist in the absence of actions by the Board that are intentionally designed to achieve segregation, and that such a discriminatory purpose is absent here. It iterates that in the absence of a malevolent motive, de facto and not de jure segregation exists.

While there is admittedly no catholicity of viewpoint in the Circuits on the question of intentional state action, this Court has never tempered its prohibition of school board actions that create, maintain, or foster segregation by the requirement that a discriminatory intent be shown. The underpinning of our decisions is a determination of the unlawful effect of state action upon the existence of unitary school systems. *Lee v. Macon County Board of Educ.*, 5 Cir. 1971, 448 F.2d 746, 752; *Stout v. Jefferson County Board of Educ.*, 5 Cir. 1971, 448 F.2d 403, 404, *citing Cooper v. Aaron, supra; Bush v. Orleans Parish*

School Board, E.D. La. 1960, 190 F.Supp. 861, *aff'd sub nom. City of New Orleans v. Bush*, 1961, 333 U.S. 212; *United States v. Texas*, E.D. Texas 1971, 330 F.Supp. 235, Part II, *aff'd as modified, United States v. Texas*, 5 Cir. 1971, 447 F.2d 441. *See Wright v. City of Brighton, Ala.*, 5 Cir. 1969, 441 F.2d 447, *cert. denied* 404 U.S. 915; *Hall v. St. Helena Parish School Board*, 5 Cir. 1969, 417 F.2d 801, 807, *cert. denied* 396 U.S. 904; *Henry v. Clarksdale Municipal School District*, 5 Cir. 1969, 409 F.2d 682, 687, *cert. denied* 396 U.S. 940.

This principle has now become the law of the land. In *Wright v. Council of the City of Emporia*, 1972, ____U.S. ____ [40 U.S.L.W. 4806, June 20, 1972], the Supreme Court held that the city could not create a new school district separate from that of the surrounding county where "its effect would be to impede the process" of the court-ordered dismantling of a dual school system, *id.* at 4812, finding that under its previous decisions in *Green v. County School Board*, 1968, 391 U.S. 430, and *Monroe v. Board of Commissioners*, 1968, 391 U.S. 450, school board action must be judged "according to whether it hinders or furthers the process of school desegregation." *Id.* at 4809. Citing with approval our decisions in *Lee* and *Stout, supra*, the Court rejected the "dominant purpose" test adopted by the Fourth Circuit decision in the case, focusing rather "upon the effect—not the purpose or motivation—of a school board's action in determining whether it is a permissible method of dismantling a dual system. . . . [T]his 'dominant purpose' test," said the Court, "finds no precedent in our decisions." *Id.* at 4810.

Importantly, the dissent voiced no opposition to the discarding of purpose and motivation, but objected only to

the majority's factual determination that the action of the city in creating its own school district would impede the progress of desegregation.

School cases serve to emphasize the correctness of this principle, for regardless of motive, the children that suffer from segregation suffer the same deprivation of educational opportunity that *Brown* condemns. No one would suggest that the validity of a segregation law depends upon the legislators' motives in enacting it, or that such a law is unconstitutional only when it can be ascribed to racial animus. Why then the distinction between types of school board action that produce segregation? "[T]he factor of malevolent motivation is farther from the core of invidiousness that condemns explicit racial discrimination than are the odious effects produced." *Goodman, De Facto School Segregation: A Constitutional and Empirical Analysis,* 60 Calif. L. Rev. 275, 291 (1972).[7]

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7. Prior to the decision in *Wright v. City of Emporia, supra,* the Tenth Circuit, in *Keyes v. School District No. 1, Denver, Colo.,* 10 Cir. 1971, 445 F.2d 990, 1004-1005, *cert. granted* 1972, No. 71-507, 404 U.S. 1036, rejected our position in *Lee* and *Stout* with regard to purpose and motivation in school cases. The district court in *Keyes* ordered the desegregation of several schools in the core area of Denver, the population of which was historically predominantly black and hispano, on the ground that these schools were segregated in fact, producing an inferior educational opportunity contrary to the mandate of *Brown.* The lower court determined, however, that this segregation, unlike that in the schools of the Park Hill area of Denver which it ordered desegregated, resulted primarily from causes other than school board action, although some Board policies had unintentionally operated to exacerbate the degree of imbalance. *Keyes v. School District No. 1, Denver, Colo.,* D. Colo. 1970, 313 F.Supp. 61.

The Tenth Circuit refused to enforce the order to desegregate these core area schools, finding that a constitutional deprivation did not exist in the absence of proof that they were segregated as a result of intentional state action. We have no doubt that the view that racially or ethnically motivated state action is a necessary prerequisite to the

Next we direct our attention to the hiring and reassignment of mexican-american teachers. The district court held that the faculty and administrative staff of the system were more segregated than the schools, and used this finding as further evidence of an unlawfully segregated school system. The Board was directed to assign black and mexican-american teachers throughout the system on the same ratio of percentages they comprise of the total teacher and staff population.[8] This finding is clearly supported by the record and the court's order is necessary to bring the Board into compliance with *Singleton v. Jackson Municipal Separate School District*, 5 Cir. 1970, 419 F.2d 1211, 1218 (*en banc*), *Ellis v. Bd. of Public Instruction of Orange County*, 5 Cir. 1970, 423 F.2d 203. The requirement of percentage assignments of faculty was presaged by the decision of the Supreme Court in *United States v. Montgomery County Board of Education*, 1969, 395 U.S. 225, in which the Court held that as a goal, the ratio of white to black teachers be substantially the same in each school as the ratio of white to black teachers throughout the system. This method of faculty desegregation has been endorsed by the Court in *Swann, supra* at 19-20.

The trial judge further found, and we agree, that the Board had discriminated against mexican-americans

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establishment of a constitutional violation in the field of public education is overruled by the decision in *Wright*. The remaining issue in *Keyes* is simply a factual one relating to causation which is inapposite to the case *sub judice*. *See* Petitioner's Brief for Certiorari, *Keyes v. School District No. 1, supra, appeal docketed*, No. 71-507, October 8, 1971.

The determination that no discriminatory purpose be shown makes it unnecessary for us to consider whether the record reveals intentionally discriminatory Board action.

8. *Cisneros I*, 324 F.Supp. at 623, and n. 56 at 619-620.

by failing to employ mexican-american teachers in the system, and ordered that it move immediately to employ more.[9] In order for the dual nature of the system to be realistically dismantled, faculty composition must more truly reflect the ratio of mexican-american students to the total scholastic population of the school district. The Board therefore must continue its efforts, which we acknowledge as substantial, toward the achievement, as a goal, of a ratio of mexican-american teachers to total faculty that approaches the ratio of mexican-american students to the total student population. In *United States v. Texas Education Agency*, 5 Cir. 1972, ____F.2d ____ (*en banc*) [No. 71-2508, July 31, 1972], today decided, we pointed out, however, that "[*t*]*he school board need not, of course, lower its employment standards.* A showing of a good faith effort to find sufficient qualified Mexican-American teachers to achieve an equitable ratio, will rebut any inference of discrimination." *Id.* at ____.

We turn now briefly to the position of the United States, the invited intervenor in this case. Essentially, it argues that we are confronted with de facto segregation with "maybe something more than isolated discrimination." The intervenor contrasts this with traditional dualism where the segregation is system wide because that is what the law required, and thus the remedy had to be system wide. But here, it is suggested, the remedy should be applied only to the areas which have become segregated by Board action.

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9. *Cisneros I*, 324 F.Supp. at 623, and n. 57 at 620. In 1969-70, out of 1909 teachers in the system, 80% were anglo, 17% mexican-american, and 3% black. During that year, the student enrollment in the system was 47.4% anglo, 47.2% mexican-american, and 5.4% black.

Such an approach is untenable here in view of our holding that over two-thirds of the public school students in Corpus Christi are the victims of unconstitutional ethnic and racial segregation. There is established here an overwhelming pattern of unlawful segregation that has infected the entire school system. To select other than a system-wide remedy would be to ignore system-wide discrimination and make conversion to a unitary system impossible. See *Green v. County School Board, supra.* A majority of the Court, Chief Judge Brown and Judges Wisdom, Gewin, Thornberry, Goldberg, Simpson and Ingraham, concur in this part of the opinion. Judges Bell, Ainsworth, Morgan and Roney concur in the result.

REMEDY

We turn now to the remedy fashioned by the district court. We conclude that a different approach may achieve a constitutional result without involving the conversion of the school system from a non-transportation to a transportation basis to the extent ordered by the district court.

On remand, the district court is directed to desegregate the school system on the following basis:

(1) It is the prerogative and duty of those local officials having charge of the Corpus Christi Independent School District to formulate and implement student assignment plans.

(2) Where a student assignment plan is found to be unconstitutional, as here, because of the existence of segregation which has been imposed by statute or by official act against blacks and an identifiable ethnic group (here the mexican-american students), it is the duty of the school

officials to forthwith formulate and implement such student assignment plan as will remedy the discrimination which has been found to exist. Where one race schools continue to exist, school authorities must show that such schools are not the result of present or past discrimination on their part. *Swann,* 402 U.S. at 26.

(3) In the event the school officials abdicate this responsibility or fail to remedy the discrimination forthwith, the district court is empowered to and should proceed forthwith to remedy the discrimination.

(4) Usually in rural, and in some city school districts where the population is diffused, assignment on a strict neighborhood basis has been sufficient to eliminate discrimination in student assignments. It is apparent that this will not suffice in the Corpus Christi Independent School District, although it may suffice as to some schools. To the extent that it does not suffice, the district court will proceed to employ other methods of desegregation.

(5) The pairing or clustering of schools, the realignment of school assignment zones, and the relocation of portable school rooms will be methods of eliminating segregated schools. Pairing or clustering should be of schools in close proximity. The pairing or clustering of schools in close proximity and the realignment of school zones will result merely in an expansion of the neighborhood or community school concept. Such transportation problems as may arise will thereby be minimized. Another method of eliminating segregated schools with little increase in transportation is to restructure the assignment of students already being transported.

(6) If after utilizing the procedures outlined above, proscribed segregated schools still exist, the court must

consider the pairing or clustering of schools in non-contiguous school zones. *Swann,* 402 U.S. at 28. No such pairing or clustering of non-contiguous school zones may be required until the court has exhausted every other possible remedy which would not involve increased student transportation. Whenever the court must exercise its power to pair or cluster schools located in non-contiguous zones, it must minimize student transportation requirements in such plan as is devised to pair or cluster schools located in non-contiguous zones.

The length and time of travel for students under any plan must be considered in light of the age of the children, and the risk to health and probable impingement on the educational process. *Swann,* 402 U.S. at 30-31. The material consideration in assessing the probable effect on health and the educational process as to each particular child will be the time required for transportation as distinguished from distance. Under some plans, children will be transported from their neighborhood school to the school of assignment rather than from their homes to the school of assignment. In such event, the time consumed in travel must include the time necessary to reach the neighborhood school or other point of embarkation.

In fashioning transportation plans the school board and district court must avoid invidious discrimination on the basis of race or national origin through the imposition of the burden of desegregation on one or both of the minority groups. *Lee v. Macon County Board of Education, supra* at 753-54; *Mims v. Duval County School Board,* 5 Cir. 1971, 447 F.2d 1330, 1331-32.

(7) As the Supreme Court made clear in *Swann,* the requirement of ". . . any particular degree of racial bal-

ance or mixing . . ." as a matter of substantive constitutional right would be disapproved. 402 U.S. at 24. Such racial balance as may result from the pairing or clustering or rezoning of schools is constitutionally permitted as "an interim corrective measure." *Swann,* 402 U.S. at 27.[10]

An overall amelioration of any possible discrimination will tend to be accomplished by the use of the mandatory majority to minority transfer provision of *Swann,* supra, 402 U.S. at 36-37, heretofore ordered by the district court. Such a provision will guarantee to both races an unfettered right to attend schools with members of an opposite race or identifiable ethnic group, and with transportation provided. The district court is directed to constitute a tri-ethnic committee in the school district to foster the use of the majority to minority transfer.[11] A majority of the Court, Judges Bell, Thornberry, Coleman, Ainsworth, Godbold, Morgan, Clark, Ingraham and Roney concur in this part of the opinion.

AFFIRMED IN PART, MODIFIED IN PART, AND REMANDED.

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10. In making certain that the school system is unitary and that the discrimination has been eliminated, we have required that specified reports be filed for three years and that the case not be dismissed thereafter without giving notice to plaintiff. *Youngblood v. Board of Public Instruction of Bay County, Florida,* 5 Cir. 1971, 448 F.2d 770; *Wright v. Board of Public Instruction of Alachua County, Florida,* 5 Cir. 1971, 445 F.2d 1397. *See Swann,* 402 U.S. at 31-32 on the termination of federal court intervention in school cases.

11. The record in *Ellis v. Board of Public Instruction of Orange County, Florida,* No. 71-2696, now pending in this Court, discloses that in the 1970-71 school term, there were 2,095 transfers of black students under the majority to minority transfer provision out of a total of 15,747 black students in the system.

GEWIN, Circuit Judge, with whom BROWN, Chief Judge, WISDOM, GOLDBERG and SIMPSON, Circuit Judges, join, concurring in part and dissenting in part:

This court today approves the district court's findings of fact and affirms its statement of the applicable law. But for reasons not stated in the opinion and certainly not apparent from the record, a majority of this court concludes that "a different approach [as to remedy] may achieve a constitutional result without involving the conversion of the school system from a non-transportation to a transportation basis to the extent ordered by the district court." I believe that today's modification-by-deletion of the district court's remedy ignores both the facts as found and the procedure followed during that court's year long effort to fashion a remedy. I therefore dissent from the "modification" of the ordered remedy.

As a member of the original panel which heard this appeal argued and as one who has painstakingly examined the record below, I fully concur with Judge Dyer's graphic and detailed description of the operation of the Corpus Christi schools and the approval of the district court's finding of school board segregation. I particularly endorse Judge Dyer's explicit abandonment of distinctions in the constitutional rights of school children based on the source or purpose of state fostered segregation.

After years of tortuous school desegregation litigation in this court reflected by hundreds of opinions in numerous volumes, the majority now stumbles and falters over issue which we have decided and laid to rest in almost every geographical area of this circuit. To realize this fact it is not necessary to cite cases; they are legion. We have dealt with practically all major school systems and many

minor ones throughout the six states over which we exercise jurisdiction. These decisions have dealt in positive and often stern fashion with the school systems of Atlanta, Savannah, Jacksonville, Miami, Jackson, Birmingham, Mobile, Montgomery, Jefferson Parish, Houston, Fort Worth and numerous others.

In most instances we were following mandates from the Supreme Court which directed us in unequivocal terms to write a decree "that promises realistically to work, and promises realistically to work *now*." Our opinions have related to all facets of desegregation and school integration including transportation, faculty and staff integration, pairing and clustering, non-curricular activities, school construction, the sale of school property, faculty ratios, hiring and firing teachers, racial protests and many others. We have not been a timid or inactive court in dealing with these problems. At times I have disagreed and have expressed my views in dissents, but the court is bound and should be bound by the long list of majority decisions we have rendered.

There is no justification for changing the rules and guidelines which we have hammered out just because the problem presented in this case relates to prohibited racial discrimination against a substantial number of Mexican-Americans and a small number of black students. I can not and will never embrace the idea that the children in Corpus Christi have different or lesser rights than the children in Jackson, Birmingham, Atlanta, New Orleans, Jacksonville and Houston, just because they are Mexican-Americans. Moreover, I continue to assert that the Constitution must be applied with equal force in all areas of the nation — North, South, East and West.

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Aside from rhetorical criticism of "bussing" the majority opinion utterly fails to demonstrate any defect in the remedy fashioned by the district court or to offer any guidance on the key substantive questions: (1) how much desegregation is required?; and (2) how much bussing is too much? The prescribed seven point "remedy" procedure essentially directs the district court to retrace its steps.

The district court ordered the school board to submit an acceptable plan (Point #2)[1] and the court then held hearings and sought the assistance of private litigants and public agencies to devise a plan of its own (Point #3).

As the majority opinion recognize, over two-thirds of the 46,000 public school students in Corpus Christi are the victims of unconstitutional ethnic and racial segregation. The majority also finds that the rigid imposition of a neighborhood school plan upon the historic pattern of marked residential segregation in Corpus Christi produced this school segregation. It is therefore absurd to believe that the use of strict neighborhood assignment (Point #4) or the pairing of close schools to expand the neighborhood or community school concept (Point #5) will significantly alleviate the existing segregation.

Even a brief examination of the district court's opinion of July 2, 1971, reveals that the court did exhaust the possibilities of zone realignment, and the pairing and clustering of schools in close proximity. The court had the benefit of the Supreme Court's opinion in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28 L.Ed.2d 575 (1971) and made specific inquiry as to the effects of bussing (Point #6).

1. These headings refer to numbers in the majority opinion under the Section entitled "Remedy."

The district judge noted that he had made no attempt to meet any certain ratio throughout the school district, but that no school should be without a substantial number of students from minority ethnic groups, and no school should be without a substantial number of Anglo students. The court found that in Corpus Christi where the Mexican-American and black students are almost one-half the student population, attendance in any school of less than 20% Anglo students or of less than 20% Mexican-American and black students (combined) would be insubstantial. The majority opinion does not object to this technique and I find no fault with a balance of "substantiality" as a constitutionally permitted 'interim corrective measure'. (Point #7).

Finally in its enigmatic decree that bussing be minimized even if after exhausting other possibilities segregated schools remain, the court is perfectly obscure on the point which will dominate the proceedings to follow below.

I believe the Supreme Court has delineated the standard with respect to transportation of students. In *Davis v. Board of School Commissioners of Mobile County*, 402 U.S. 33, 28 L.Ed.2d 477 (1971) the Court rejected a desegregation plan prepared by this court because it was based on treating the western section of the county in isolation from the eastern section. The court stated:

> Like the District Court's plan, the Court of Appeals' plan was based on treating the western section in isolation from the eastern. There were unified geographic zones, *and no transportation of students for purposes of desegregation.* The reduction in the number of all-Negro schools was achieved through pairing, rezoning, and adjusting grade structures within the eastern section.
>
> . . .

A district court may and should consider the use of all available techniques including restructuring of attendance zones and both contiguous and noncontiguous attendance zones. See *Swann*, supra, at 22-31, 28 L.E.2d at 570-575. The measure of any desegregation plan is its effectiveness.

On the record before us, it is clear that the Court of Appeals felt constrained to treat the eastern part of metropolitan Mobile in isolation from the rest of the school system, *and that inadequate consideration was given to the possible use of bus transportation and split zoning.* For these reasons, we reverse the judgment of the Court of Appeals as to the parts dealing with student assignment, and remand the case for the development of a decree "that promises realistically to work, and promises realistically to work *now*."

402 U.S. at 36-38, 28 L.Ed.2d 580-81. Without reason or authority the majority opinion abandons the mandate of *Davis* and numerous other Supreme Court decisions.

I realize that the remedy as ordered by the district court presents serious financial and administrative difficulties. It is a very substantial matter to direct the busing of one-third of the district's students. But I do not find it at all surprising that such a remedy might be required in a system where over two-thirds of the students attend segregated schools. The remedy ordered is the consequence of the district court's consideration of precisely those factors and priorities which this court now decrees. I would affirm the order with leave to the district court to amend the order as the practicalities of the situation require in order to avoid undue hardships or burden on the School Board.

COLEMAN, Circuit Judge, concurring in part and dissenting in part:

Given the decision on the merits as outlined in the majority opinion, I concur in the procedures discussed with reference to the appropriate remedy.

As in *United States v. Texas Education Agency*, 5 Cir., 1972, ____ F.2d ____ (en banc) [No. 71-2509, August 2, 1972] I would defer decision on the merits in this case until we shall have received the guidance of the Supreme Court which ought to come with the decision of the *Denver* case, now on the calendar of the Supreme Court.

I, therefore, dissent to deciding the *Corpus Christi* case at this time.

Seeing, however, that the case nevertheless is to be decided, I wish briefly to express some separate views of my own. This is done with considerable reluctance because when the Supreme Court speaks in the *Denver* case my observations may turn out to be legally incorrect or useless.

I am compelled to say that I am unable to agree, as a legal proposition, that the United States is a Country which is composed of "many nations within a nation". We have Americans of Mexican extraction, of Polish extraction, of Irish extraction, of many other extractions, and we have Americans who are either poor or rich. Even so, *an American is an American*, without prefix or suffix — as Mr. Sam Rayburn once said (on another subject).

The idea that there are mexican-americans, afro-americans, or any other hyphenated americans, leads either to divisions among the people or to political "power plays",

or both. If a person is an American, that should "end it" and he ought to remember "E Pluribus Unum".

Americans of Mexican ancestry are members of the white race. Therefore, if any children of Mexican ancestry are being required to attend a school which by comparison is deficient in faculty, or curriculum, or school plant, then the school board should be mandatorily required to correct the deficiencies right where they exist. This should be done not because the children are of Mexican ancestry but because *all children* in these United States are entitled to the equal protection of the law.

This would avoid the highly artificial and necessarily unstable expedient of requiring children to spend a substantial portion of their days on buses and in strange localities.

In *Brown v. Board of Education,* 347 U.S. at 494 (1953), the Supreme Court said:

> "To separate them [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

The same effect is inevitable when children are reminded every day that they live in a community of such inferiority [so considered by those in authority] that they must be bussed out of it for an education, but condemned to remain in it at all other times. Such children will not become integral parts of the communities to which they are bussed. The real, and lasting, remedy would be to improve the housing, the schools, and the living con-

ditions where the children live. The government is equally as able to do this as it is to conduct daily upheavals in mass, via the bus.

My sympathies are with children who are faced with the lack of educational opportunity. I would not claim to cure the problem by the application of a "band-aid' of doubtful, if not harmful, value.

GOLDBERG, Circuit Judge, with whom BROWN, Chief Judge, and WISDOM, GEWIN and SIMPSON, Circuit Judges, join, concurring in part and dissenting in part:

I concur in every word and syllable of Judge Dyer's opinion of superlative excellence until the section captioned "Remedy" is reached. Discerning no error in the decree of the district court, I would affirm without qualification or equivocation.

The Board argues that the remedy fashioned by the district court is so excessive that it is erroneous. I entertain no doubt whatsoever that the methods adopted by the district court in its plan to desegregate the school system, e.g., the pairing of schools and alterations of attendance zones, are within the scope of the court's remedial powers. *Swann v. Charlotte-Mecklenburg*, 1971, U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554. But the critical factor is that the majority itself makes clear today that it entertains no such doubt. Thus, my dissent is compelled as much by confusion at what the majority has done as by disagreement with its remedy. I fail to understand why the majority would agree to the substantive requirements as set forth in Judge Dyer's fine opinion, and then remand to the district court for a remedy based on findings of fact that have already been made.

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The majority concludes that student assignment plans are initially the prerogative of the school board. So the district court held, and so we have held on a number of occasions. Yet the majority remands. The majority admits that the school board must bear the burden of proof if it wishes to maintain a system found to be unconstitutionally segregated. So the district court found. Yet the majority remands. The majority concludes that the district court must proceed to desegregate if the board fails to do so. The district court found that the board in Corpus Christi failed to desegregate to any substantive degree, and the district court then proceeded to fashion a remedy. A very able district judge requested that the school board submit a comparative plan for integrating its schools. The board refused to offer any constructive suggestions whatsoever. *Cisneros v. Corpus Christi Ind. School Dist.*, S.D. Tex. 1971, 330 F.Supp. 1377. It is astounding that the school board would then urge that this court delay implementing the district court order when the school board itself failed to advance any constructive suggestion of its own. It is even more astounding that a majority of this court now condones the board's behavior. Yet the majority remands.

The majority endorses pairing, clustering, and realignments of school zones, as indeed it must under the precedents of this court and of the Supreme Court. *See especially Brown v. Board of Education of Bessemer, Alabama,* 5 Cir. 1972, slip op. 71-2892 [July 11, 1972]. The district court paired, clustered, and realigned school zones. Yet the majority remands. The majority concludes that transportation may as a last resort be required to eliminate segregation in the Corpus Christi schools. If transportation is required, the majority intones, then the

district court must order busing. The district court found as a matter of fact that some transportation would be required in Corpus Christi. Yet the majority remands.

In short, every single finding of fact that is necessary to support the majority's substantive reasoning has already been made. Yet the majority remands. The remedy that the majority has engrafted onto the reasoning of the district court and of this court will produce no substantive changes whatsoever in the trial court's original decree—except delay. Without so much as a hint that the findings by the trial judge with regard to the remedy were erroneous, the majority cavalierly consigns the plaintiffs to another round of litigation and the school children of Corpus Christi to another round of segregated education.

> "There is a constitutional right that must be vindicated by a desegregation plan—a right possessed by the students of the district, not by the parties involved in the negotiations. If a constitutional right to attend integrated schools actually exists, there must be a way of ensuring that it is not bartered away in a trade-off for other goals or lost because of incompetence or inadvertence."

Comment, "Busing, Swann v. Charlotte-Mecklenburg, and the Future of Desegregation in the Fifth Circuit," 49 Texas L. Rev. 884, 907 (1971).

The board alleges that it will sustain a financial burden in providing any buses necessary for implementation of the court's student assignment plan. In *Swann* the Court found that bus transportation was a normal and accepted tool of educational policy. Notwithstanding the fact that the "remedy . . . may be administratively awkward, inconvenient, and even bizarre in some situations and may

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impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems." *Swann v. Charlotte-Mecklenburg,* 401 U.S. at 28, 28 L.Ed.2d at 573. Busing is transportation, nothing more. If it is possible to integrate the schools of Corpus Christi without the purchase of a single bus, then that is clearly preferable. But the critical question is integration not transportation.

> "It is imperative, then, that the Nation's judicial system be able to deal efficiently with the basic concept of busing. If the judiciary does not, the future of desegregation may be endangered. . . . Whatever the wisdom of the judiciary's original involvement in desegregation, it would be tragic for the forces of equality to be frustrated, after victory in so many bloody battles, merely because the courts could not rise to the task presented them."

49 Texas L. Rev. at 910.

I doubt that the extent of busing that might be necessary under the district court's original plan has been fully explored by the majority or the school board. I think it is not unlikely that far less transportation and at less cost may be required than that which has been estimated. Because of the density of Mexican-American and black children in the "corridor" area of Corpus Christi, which is approximately in the center of the school district, there may well be a number of alternatives in rearranging boundaries that would reduce the number of children to be bused. Furthermore, during this appeal a bond issue has been approved in which $5.9 million is allocated for building, renovating, and rebuilding various schools. A number of alternatives that do not require transportation

are now available in careful site selections. All of this is not to say that the implementation of the district court's plan should be postponed or placed in limbo while other avenues finally leading to a unitary school system are explored. The school board had its chance, the district court made its findings, and both should now be concluded. Desegregation of the Corpus Christi school system is long overdue, and the plan approved by the district court should be promptly put into effect. But I suggest that with some innovation the segregated system could have been and now can be eliminated without the dire consequences that are conjured up by the school board.

Swann and its lineal ascendants and forefathers command us to be sensitive to the trial court's proximity to the problems. This reference to the trial court's localization is particularly persuasive when the trial judge himself, as here, concludes that some drastic action is required. *See* Comment, "School Desegregation after *Swann*: A Theory of Government Responsibility," 39 U.Chi.L.Rev. 421 (1972).

Admittedly the trial court performed needed major surgery in order to purge the system of ethnic prejudice and discrimination. Such surgery has heretofore been confirmed as a therapeutic necessity. I would not incise again and apply a Band-Aid to the incision, as the majority has done with its "remedy." The remand would permit and even auspicate a jejune and mild antiseptic. The ghetto line is clearly marked "Ayres Street" in Corpus Christi, and designating it as the ethnic division point, has infected the whole system. First aid to a toe and then to a finger finds no support in the Supreme Court's diagnosis and prognosis for ending segregation in schools "root and branch." I do not read *Swann* as a countermanding order

to patch up the school district and return it to action with a terminal case of the Mexican-American counterpart to Jim Crowism. *See* Comment, "Project Report: DeJure Segregation of Chicanos in Texas Schools," 7 Harv. Civ. Lib. — Civ. Rights L. Rev. 307. If the Supreme Court wanted to let roots and branches of discrimination foliate, it would have so decreed. Until its orders are clarion, I will use every effort to despoil any system that permits unconstitutional discrimination in the public schools by whatever description semantics — de facto, de jure, state action. In fact, the Supreme Court reversed one of this court's decisions in a companion case to *Swann, Davis v. Board of School Commissioners,* 1971, 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577. To me this response not only vindicated the efforts that this court had made toward maximizing the integration of the school systems, but indicated that even more rigorous action on our part was called for. Yet the majority remands.

This is not the hour, this is not the day, and Corpus Christi is not the place for courts to flag in their striving for constitutional schools, for quality education, for integrated education. I am aware that the board's resources are not unlimited. If the district court finds after a plenary hearing with full findings of fact and conclusions of law that the board is unable to carry out any of the plans, then that court or this court may, of course, adjust its order accordingly. Our court must of necessity rely to a large extent on the informed judgment of the district court, the majority's actions today notwithstanding. In my judgment, however, it is also necessary to say clearly that the days of "with all deliberate speed" are gone, and gone forever. The district court plan should be implemented now, for "[t]he obligation of every school district is to

terminate dual school systems at once and to operate now and hereafter only unitary schools." *Alexander v. Holmes County,* 1969, 396 U.S. 19, 90 S.Ct. 14, 24 L.Ed.2d 41. The majority's so-called "remedy" in this case is not an abdication of our past efforts. It is a regression. "Equal protection of the laws" means equal protection, not equivocal protection.

AINSWORTH, Circuit Judge, with whom BELL and RONEY, Circuit Judges, join, concurs in the result, and in the remedy which the District Court is directed to provide on remand of this case.

GODBOLD, Circuit Judge, with whom COLEMAN, MORGAN, and CLARK, Circuit Judges, join, files the following special opinion.

For the reasons set out in the special opinion of Judge Godbold in *United States of America v. Texas Education Agency, et al.,* No. 71-2508, decided this date, we would hold this appeal in abeyance pending further action by the Supreme Court of the United States, and we dissent from consideration of the merits at this time. Directed as we are by a vote of eight judges to seven to consider the merits, we concur in only that part of the opinion of Judge Dyer headed "Remedy."

BROWN, Chief Judge, with whom WISDOM, GEWIN, THORNBERRY, GOLDBERG, DYER and SIMPSON, Circuit Judges, join:

To Judge Godbold's dissent I reiterate my response in 71-2508, *United States of America v. Texas Education Agency.*

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office Of The Clerk

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Clerk

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August 2, 1972

Mr. V. Bailey Thomas, Clerk
U.S. District Court
P.O. Box 2567
Corpus Christi, Texas 78400

No. 71-2397-Jose Cisneros, et al v. Corpus Christi Independent School Dist. et al
(U.S. D. C. No. 68-C-95)

Dear Mr. Thomas:

Enclosed is a certified copy of an opinion-order this day entered by the court in the referenced cause which is issued as and for the mandate.

Returned herewith are three boxes and three flat packages of exhibits. The 22 Volume Record on Appeal and roll of exhibits will be returned to you shortly.
Please acknowledge receipt on the enclosed copy of this letter.

Very truly yours,

EDWARD W. WADSWORTH
Clerk

By: DONNA PROTTI
Deputy Clerk

/dp
cc and enc. to:

Messrs. Richard A. Hall
J.W. Gary
Messrs. Donald L. Howell
David T. Searls
Mr. Scott T. Cook
Mr. Chris Dixie
Mr. James DeAnda
Mr. Brian Landsberg
Hon. Richard G. Kleindienst
Mr. Chas. Stephen Ralston
Mr. Mario Obledo
Mr. Edward Idar, Jr.
Mr. David L. Norman
Mr. James P. Wolf

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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-649

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

JOSE CISNEROS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-649

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

JOSE CISNEROS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit is unreported and is set out in the Appendix to the Petition for Writ of Certiorari at pp. 119-154. The opinions of the district court are reported at 324 F. Supp. 599 and 330 F. Supp. 1377, and are set out in the Appendix at pp. 1-48 and 54-97, respectively.

Jurisdiction

The judgment of the Court of Appeals was entered on August 2, 1972 (A. 155). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented

The district court herein found as a matter of fact that Mexican-American and Negro children in the Corpus Christi Independent School District had been segregated into separate schools because of their race and national origin through the actions of the School District. It held as a matter of law that these actions violated the rights of those students to the equal protection of the laws. The Court of Appeals upheld the district court's findings of fact and affirmed its holding in reliance on this Court's school desegregation decisions. Under these circumstances, is there any basis for a review of the lower court's holding by this Court?

Statement of the Case

This action was brought in 1968 in the United States District Court for the Southern District of Texas, pursuant to 42 U.S.C. § 1983, on behalf of Mexican-American and Negro parents and pupils on their own behalf and as representatives of the classes of Mexican-American and Negro pupils attending schools in the District. The case was brought to end the unconstitutional segregation of students by race and national origin in the District schools. After a lengthy trial the district court issued extensive findings of fact and conclusions of law. The court found that because of the actions of the defendant school officials both Negro and Mexican-American students had been segregated on the basis of their race and national origin from Anglo students.

On the basis of these findings, the district court required the immediate implementation of a comprehensive desegregation plan. A notice of appeal was filed by the school of-

ficials and a stay of the implementation of the plan was obtained from another district judge because of the trial judge's absence from the district. That stay was vacated by the Fifth Circuit, but was reinstated by Mr. Justice Black acting as Circuit Judge for the Fifth Circuit in an order reported at 404 U.S. 1211 (1971).

On the appeal, the Fifth Circuit, sitting *en banc,* affirmed the district court as to its findings of fact and conclusions of law, but vacated the order as it related to the desegregation plan itself and remanded for further proceedings. A cross petition seeking review by this Court of the Fifth Circuit's order requiring a new plan is pending in this Court, *sub nom., Cisneros* v. *Corpus Christi Independent School District,* Oct. Term 1972, No. 72-668.

Statement of Facts

The district court made exhaustive findings of fact, which are summarized by the Fifth Circuit in its opinion. We respectfully refer this Court to all three opinions, set out in the appendix filed with the cert. petition, and here we will merely summarize the most significant facts as found by the district court.

In sum, this case involves a fact pattern similar to that developed in a number of other school desegregation cases. That is, the school district was found to have adopted and followed a consistent policy of structuring school attendance zones, building and expanding schools, and instituting transfer policies, so as to take advantage of existing residential segregation in the City of Corpus Christi, and hiring and assigning faculty, all resulting in Anglo students attending schools separate from those attended by Mexican-American and black students.

The following are the most important findings of fact of the district court:

1. "Mexican-American students are an identifiable, ethnic-minority class" in the Southwest, Texas,[1] and in Corpus Christi (A. 13-16).

2. Those students "are now separated and segregated . . . in all three levels of the school system" (A. 17, 18-21, n. 36-37), even to a greater degree than they are segregated residentially (A. 37-38).

3. There has been an historic pattern of discrimination against Mexican-Americans in the Corpus Christi school district which contributed to their segregation in the schools (A. 21-27, n. 38-40).

4. Negro students are also segregated in the system, as are both Mexican-American and Negro faculty members (A. 27-29; 35, n. 56; 41).

5. Expert testimony established that the segregation of Mexican-American and Negro students causes them to suffer "harmful effects," including "psychological and emotional trauma, and scarring and crippling." (A. 42; 7. n. 26.)

6. The segregation in the schools was not simply the result of residential segregation. Rather:

---

[1] See, United States Commission on Civil Rights, MEXICAN AMERICAN EDUCATION STUDY, Report 1: Ethnic Isolation of Mexican Americans in the Public Schools of the Southwest, April, 1971, pp. 21-38; Inter-Agency Committee on Mexican-American Affairs, El Paso, Tex., October 26-28, 1967, p. 98; Texas State Advisory Committee to the United States Commission on Civil Rights, THE CIVIL RIGHTS STATUS OF SPANISH-SPEAKING AMERICANS IN KLEBERG, NUECES, AND SAN PATRICIO COUNTIES, TEXAS (July, 1967); and the studies cited in *Mexican-Americans and the Desegregation of Schools in the Southwest*, 8 Houston Law Review, 929, 939, n. 75.

> The court is of the firm opinion that administrative decisions by the school board in drawing boundaries, locating new schools, building new schools and renovating old schools in the predominantly Negro and Mexican parts of town, in providing an elastic and flexible subjective transfer system that resulted in some Anglo children being allowed to avoid the ghetto, or "corridor" schools, by bussing some students, by providing one or more optional transfer zones which resulted in Anglos being able to avoid Negro and Mexican-American schools, not allowing Mexican-Americans or Negroes the option of going to Anglo schools, by spending extraordinarily large sums of money which resulted in intensifying and perpetuating a segregated, dual school system, by assigning Negro and Mexican-American teachers in disparate ratios to these segregated schools, and further failing to employ a sufficient number of Negro and Mexican-American school teachers, and failing to provide a majority-to-minority transfer rule, were, regardless of all explanations and regardless of all expressions of good intentions, calculated to, and did, maintain and promote a dual school system.

(A. 31-36, n. 50-57.)

7. The explanations of the defendant school officials for their adopting and following the above policies were not adequate to establish their independent validity (A. 41).

From these findings of fact, which are fully supported by the record,[2] the district court drew the following con-

[2] Throughout its opinion, the court makes reference to the exhibits and testimony introduced at trial. See, *e.g.*, A. 3-7; 7, n. 26; 17-21, n. 37; 22-26, n. 38-40; 31-36, n. 50-57. The decision describes the trial judge's exhaustive study and analysis of the evidence (A. 2), and points out the extent to which it was necessary to resolve factual disputes (A. 6-8, n. 26).

clusions of law. First, the school district was segregated in violation of the Fourteenth Amendment as to both Negro and Mexican-American students. The former had formerly been segregated pursuant to statute and that dual system was never disestablished. The latter were segregated as a result of the above described policies of the school district. Second, this segregation could not be remedied "by placing Negroes and Mexican-Americans in the same school" (A. 29). Rather, the duty was on the school district to adopt a plan that would result in a unitary system within the meaning of decisions of this Court and the Fifth Circuit.

To this end, further proceedings were held, resulting in the decision of July 2, 1971 (A. 54-97). The court required a comprehensive plan to be adopted in compliance with the standards established by this Court in *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971) and *Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33 (1971) (A. 76-77, 82).

Reasons Why the Writ Should Be Denied

Despite the arguments made by the petitioner school district, it is clear that the Court of Appeals and the district court both followed long-standing decisions of this Court and adhered to its most recent decisions regarding school desegregation. Thus, this case does not present any new issues of law, nor do the decisions below conflict with decisions of this Court or with those of other circuits. In essence, the quarrel of petitioners is with the findings of fact made by the district court and affirmed by the Court of Appeals. However, petitioners present no basis for this Court's holding that those fiindings are clearly erroneous. Therefore, this case does not warrant review by this Court on certiorari.

I.

The Factual Allegations Made by the Petitioners Were Resolved Against Them by the District Court, and There Is No Basis for the Review of These Findings Here.

Since a number of the legal arguments made by the school district are based on its characterization of the facts, some preliminary discussion of what was actually found by the trial court is necessary. Basically, petitioners present *their* version of the facts as though it was undisputed, and generally disregard or misstate the trial court's findings. In essence, the petition seeks to retry the facts here after having had adverse findings below. Of course, this Court does not sit as a trial court, and petitioners have simply failed to sustain their burden of demonstrating that the Court should grant review on the ground that the findings are clearly erroneous under Rule 52(a), Fed. R. Civ. Proc.

Some examples of disparities between factual assertions in the petition and the findings of the trial judge are illustrative:

1. The petition asserts that, "the record is . . . devoid of evidence of discrimination against Mexican-Americans in the community" (Petition for Writ of Certiorari, p. 8). To the contrary, the district court found that there *was* such discrimination, based that finding on extensive testimony (A. 22-26, n. 38-40), and further found that this discrimination contributed to school segregation (A. 27).

2. The petition asserts that there was "no evidence" that school boundaries were established or changed for the

purpose of segregation (Pet. 11). The district court found that decisions "in drawing boundaries" and locating and expanding schools "were . . . calculated to, and did, maintain and promote a dual system" (A. 31, 36), and gave examples (A. 31, n. 50).

3. The petition states that the record did not show "ethnic imbalance as a result of discrimination" and that the trial court did not so find (Pet. 12). The district court found that the historical pattern of discrimination contributed to segregation (A. 27), and that segregation resulted from the actions of the school board (A. 31-36).

4. The petition states that in 1969 "no school in the District had a teaching staff of more than 50% Mexican-American and only two . . . had a combined Negro-Mexican-American staff exceeding 50%" (Pet. 11). While this statement is literally true, it is misleading in light of the small percentage of Mexican-American (17.3%) and Negro (3.1%) teachers employed in the system (A. 35, n. 57). The point is, as the trial court found, that those teachers were concentrated in schools with predominantly Mexican-American and/or Negro student bodies (A. 34-35, n. 56; 41; 17-20, n. 37).[3]

5. Finally, in arguing that certiorari should be granted, it is stated that there was no evidence that isolation on the basis of national origin caused damage to Mexican-American students of the sort contemplated by *Brown* v. *Board of Education* (Pet. 20-21). To the contrary, the district

[3] For example, in Barnes Junior High, 94.03% of the pupils and 38.46% of the teachers were Mexican-American, so that the percentage of Mexican-American teachers was more than twice the percentage in the system as a whole. In Sundeen Junior High, on the other hand, 21.60% of the pupils and 3.03% of the teachers were Mexican-American (A. 18).

court made precisely that finding, and based it on extensive testimony of an expert witness (A. 42; 7, n. 26).

In noting these disparities between the assertions of the petitioners and the findings of the district court, our intent is not to engage in this Court in a dispute over what were the facts. Our point is that the trial court found the facts in our favor (A. 49), that its findings are clearly supported by the record, and petitioners have provided no reason for this Court reviewing this case for the purpose of overturning them.

II.

The Decision of the Court of Appeals Is Fully In Accord With Decisions of This Court and Those of Other Circuits.

Essentially, the petition seeks to create a case that is appropriate for certiorari by characterizing the Fifth Circuit's opinion as being a radical departure from prevailing law. An examination of what the Court of Appeals in fact held, however, demonstrates that the court adhered in all respects to established precedent.

First, petitioners urge that the court's abandoning of the distinction between "*de jure*" and so-called "*de facto*" segregation requires review by this Court. However, it is clear that the Fifth Circuit was simply addressing itself to the contention that segregation is unconstitutional, or "*de jure*," only if it had been mandated by statute; otherwise it is "*de facto*" and unassailable. The court was obviously correct in rejecting that position, for whatever may be thought to be the meaning of the *de-jure—de-facto* distinction, it does not rest on the presence or absence of statutorily mandated segregation.

Of course, the existence of such a statute makes the proof of state-created segregation relatively simple. But it still can be proved, as in this case, by showing that the segregation or discrimination resulted from actions of state officials acting without explicit statutory authority, just as, for example, such unconstitutional discrimination can be shown in jury discrimination cases.

Indeed, *Swann* v. *Charlotte-Mecklenberg Board of Education,* 402 U.S. 1 (1971), supports this conclusion in two respects. There, this Court was, of course, dealing with segregation originally imposed pursuant to statute. But the lengthy discussion of issues such as school placement, attendance zones and faculty ratios makes it clear that constitutional violations arise by school board actions that create or perpetuate segregation even in the absence of a statute. In addition, this Court addressed itself briefly to the *de facto—de jure* distinction in discussing the meaning of Title IV of the Civil Rights Act of 1964 in relation to school desegregation litigation. By describing "so-called 'de facto segregation'" as segregation "where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities" (402 U.S. at 17-18), it was made clear that segregation that was so caused violated the Fourteenth Amendment whether or not a statute mandated the action.

Thus, it is clear that all the Fifth Circuit did in its discussion of *de facto—de jure* segregation was to abandon what it believed, and rightly in our opinion, to be confusing terminology. Thus, its holding was simply that the question in a school desegregation case was whether the segregation was "unconstitutional" in the sense that it was caused by and was the result of state action, whether or not such action was under the specific command of a statute (A. 127-130). In so defining the issue, of course, the court

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below followed decisions of this Court going as far back as *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886).

Second, petitioners argue that the holding of the court below that there is no necessity for showing that the policies of the school board were adopted with the specific intent of discriminating against Mexican-American students conflict with decisions of this Court. The holding of the Fifth Circuit, however, is wholly in accord with decisions which explicitly hold that it is unnecessary to attempt to uncover the underlying motivations of state officials in racial discrimination cases. Rather, the proper focus is on the *effect* of their actions. See, *Palmer* v. *Thompson,* 403 U.S. 217, 224-226 (1971).

Indeed, the Fifth Circuit relied upon and followed this Court's most recent pronouncement on school segregation, *Wright* v. *Council of the City of Emporia,* 407 U.S. 451 (1972). In *Wright,* this Court rejected the Fourth Circuit's holding that the purpose or motivation of a school board's action must be looked to to determine whether it violated the Constitution. The Court held:

> It is true that where an action by school authorities is motivated by a demonstrated discriminatory purpose, the existence of that purpose may add to the discriminatory effect of the action by intensifying the stigma of implied racial inferiority. . . . But as we said in *Palmer* v. *Thompson,* . . . it "is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators," and the same may be said of the choices of a school board. 407 U.S. at 461-62.

Thus, the question in any case arising under the Fourteenth Amendment is whether there has been a violation

of its mandate. Rather than trying to search the minds of state officials as to the underlying purpose or motivation of their actions, it is appropriate for a federal court to limit its inquiry to whether those actions have had the effect of denying equal protection. The district court here made precisely that inquiry and found that the policies adopted by the school board had the proscribed effect. The standard laid down by the Fifth Circuit—that the school board would be held responsible for the natural and probable results of administrative decisions made with awareness of their effect—is clearly correct.

Thus, contrary to the assertions of the petitioners, the lower court did *not* hold that the mere existence of racial or ethnic imbalance with nothing more constitutes a violation of the Fourteenth Amendment. Rather, it stated a two-pronged test; there must be found a denial of equal educational opportunity because of racial and ethnic isolation,[4] *and* "this segregation must be the result of state action" (A. 129).

In sum, the Fifth Circuit adhered to long-standing precedent established by this Court; in particular, it referred to this Court's decision in *Hernandez* v. *Texas,* 347 U.S. 475 (1954), which held that Mexican-Americans are fully protected by the equal protection clause of the Fourteenth Amendment if they are subjected to discrimination as an identifiable ethnic group.[5] Although *Hernandez* involved jury discrimination, its rationale is applicable to this case. There, as here, there was no history of exclusion of Mexican-Americans from jury duty imposed by statute,

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[4] Of course, reliance on statistical evidence to establish this first element was proper.

[5] As are other ethnic groups. See, *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886); *Korematsu* v. *United States,* 323 U.S. 214 (1944).

as was the case in many southern states with regard to the exclusion of blacks. There, as here, the Court looked to the objective indicia of actions of state officials to determine whether there had been a constitutional violation, and avoided the impossible task of probing their innermost motivations.

Finally, the decision below does not conflict with that of other circuits. Rather, the Courts of Appeals are in agreement that actions such as those of the Corpus Christi School District which perpetuate or result in school segregation violate the Fourteenth Amendment to the Constitution. *Davis* v. *School Dist. of Pontiac,* 309 F. Supp. 734 (E.D. Mich. 1970), *aff'd* 443 F.2d 573 (6th Cir. 1971), *cert. denied,* 404 U.S. 913 (1971); *United States* v. *School Dist. No. 151,* 286 F. Supp. 786 (N.D. Ill. 1966), *aff'd* 404 F.2d 1125 (7th Cir. 1968), 301 F. Supp. 201 (N.D. Ill. 1969), *aff'd* 432 F.2d 1147 (7th Cir. 1970), *cert. denied,* 402 U.S. 943 (1971); *Kelly* v. *Guinn,* 456 F.2d 100 (9th Cir. 1972); *cf. Brewer* v. *School Bd. of Norfolk,* 397 F.2d 37 (4th Cir. 1968); *Clark* v. *Board of Educ. of Little Rock,* 426 F.2d 1035 (8th Cir. 1970), 449 F.2d 493 (8th Cir. 1971); *United States* v. *Board of Educ.,* 429 F.2d 1253 (10th Cir. 1970).[6]

[6] Petitioners make a final argument—that if they are required to desegregate they must be given a "reasonable" time to do so. This seems to be little more than an attempt to resurrect "all deliberate speed," a standard abandoned by this Court in 1964. *Griffin* v. *School Board of Prince Edward,* 377 U.S. 218, 234 (1964). Of course, once a constitutional violation has been established it must be remedied immediately. *Alexander* v. *Holmes County Board of Ed.,* 396 U.S. 19 (1969). There has already been a delay of one and one-half years in the implementation of *any* plan for the district.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 72–649 and 72–668

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT, ET AL., PETITIONERS

v.

JOSE CISNEROS, ET AL., CROSS PETITIONERS

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

This school desegregation class action was brought on July 22, 1968, by black and Mexican-American parents of children in the Corpus Christi Independent School District. Following an initial trial, the district court found that both blacks and Mexican-Americans were unconstitutionally segregated in the Corpus Christi schools as a result of official actions by the defendants (Pet. App. 1–52). The court of appeals denied the defendants' petition for permission to appeal the interlocutory order of the district court (Pet. App. 53).

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Thereafter, various desegregation plans were submitted by the parties, and the district court held a hearing with respect to the relief to be ordered. On October 16, 1970, the district court requested the assistance of the United States Departments of Justice and Health, Education, and Welfare. The Department of Justice, pursuant to the court's request, applied for and was granted leave to intervene. After receiving a desegregation plan prepared by the Department of Health, Education, and Welfare, and objections thereto by both plaintiffs and defendants, the district court on July 2, 1971, ordered the implementation of its own plan, reflecting elements of the plans submitted by the parties, with certain alterations made by the court (Pet. App. 54–103).

The defendants appealed from the district court's judgments holding that black and Mexican-American students were unconstitutionally segregated in the Corpus Christi schools and requiring implementation of the student assignment plan set forth in the court's opinion of July 2, 1971.[1] The July 2 order was stayed pending a decision by the court of appeals (Pet. App. 104–105). On August 2, 1972, the court of appeals affirmed the finding of unconstitutional segregation, but directed the district court to use a different approach in fashioning a remedy on remand (Pet. App. 119–154).

1. The district court found that the defendants had discriminated against black and Mexican-American students by gerrymandering attendance zone bound-

[1] The petitioners do not seek review in this Court of the findings regarding black students.

aries, discriminating in construction and location policies for new and existing schools, discriminating in faculty assignment policies, promoting segregation in transfer policies, and failing to take reasonable steps to promote desegregation generally (Pet. App. 31–36). The Corpus Christi school system was therefore held to be *de jure* segregated (Pet. App. 36). The court of appeals, while not disapproving the district court's findings, concluded that "the direct and effective cause of segregation in the schools" was the defendants' imposition of "a neighborhood school plan, *ab initio,* upon a clear and established pattern of residential segregation in the face of an obvious and inevitable result" (Pet. App. 131). The court of appeals also held that discriminatory intent, in the form of racially motivated state action, need not be shown to establish a violation of students' constitutional rights (Pet. App. 132–134).

The school district's petition presents questions concerning the standards for determining whether schools are *de facto* or *de jure* segregated and the extent to which discriminatory intent by school officials must be shown to support a finding that a student assignment policy is unconstitutional.[2] In our view, as ex-

[2] The petition presents five questions (Pet. 3–4), three of which concern the extent of a school district's duty to "eliminate unintended ethnic [Mexican-American] concentrations in some of the schools which result from residential and demographic patterns not effected by state action" or to abandon the neighborhood school concept in the face of such concentrations. The last two questions relate to the appropriate scope and timing of a desegregation remedy where at least some discrimi-

pressed in our brief below and our brief as *amicus curiae* in *Keyes* v. *School District No. 1, Denver, Colorado, et al.*, No. 71–507, this Term (argued October 12, 1972), specific school board actions or policies which cause or promote segregation *on account of race or national origin* must be remedied. While failure to show subjective segregative motivation by school board officials is irrelevant to the determination of unconstitutional segregation of public schools (cf. *Wright* v. *Council of the City of Emporia*, 407 U.S. 451, 462), circumstances showing their explicit consideration of race or implicit race-consciousness are of central importance. If the court below meant to direct that the inquiry should ignore the question of objective intent and focus only on the elements of state action and segregative effect,[3] its opinion would seem to prohibit racial imbalance in a neighborhood school system regardless of whether discrimination exists. We submit that such a result would be inconsistent with this Court's affirmance of *Spencer* v. *Kugler*, 326 F. Supp. 1235 (D. N.J.), affirmed, 404 U.S. 1027, and with its opinion in *Jefferson* v. *Hackney*, 406 U.S. 535, 547–549.

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natory action toward Mexican-Americans is found in a system where that ethnic group has never been segregated by statute.

[3] The majority opinion (Pet. App. 129) states that *Brown* requires simply the making of two distinct factual determinations to support a finding of unlawful segregation. First, a denial of equal educational opportunity must be found to exist, defined as racial or ethnic segregation. Secondly, this segregation must be the result of state action.

Accordingly, if this Court agrees with the analysis suggested in our *amicus curiae* memorandum in *Keyes*, an appropriate disposition here would be to grant the petition, vacate the judgment below, and remand for further consideration in light of *Keyes*. The Court may therefore wish to defer action on the petition pending its decision in *Keyes*.

2. In addition, the court below (Pet. App. 136–137) ordered the fashioning of broad brush, system-wide desegregation relief, of the sort traditionally applied in remedying statutory dualism, as opposed to school-by-school relief based on a showing with respect to each that the segregation has been caused by intentional segregative action on the part of the school board. As we argued below, however, whether the relief appropriate in a case of statutory dualism is appropriate in a case such as this depends upon the extent of the proved discrimination.

Finally, while approving a system-wide remedy, the court of appeals concluded that a proper remedy could be achieved without increasing student transportation to the extent required by the district court (Pet. App. 137). It therefore remanded the case for the application of specified remedial guidelines (Pet. App. 137–140). The cross-petition of Cisneros presents the question whether a remand on this basis was erroneous (Cross-Pet. 2).

These issues with respect to the remedy may also be resolved by this Court in *Keyes*. The Court, therefore, may wish to postpone disposition of the present petitions pending its decision in *Keyes*.

Respectfully submitted.

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DECEMBER 1972.

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IN THE

Supreme Court of the United States

October Term 1972

No. 72 - 649

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT, ET AL, *Petitioners,*

v.

JOSE CISNEROS, ET AL, *Respondents.*

Petition For Rehearing Of Order On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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In The

Supreme Court of the United States

October Term 1972

No. 72-649

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT, ET AL, Petitioners,

v.

JOSE CISNEROS, ET AL, Respondents

PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

This Court should reconsider and grant petitioners' Petition for Writ of Certiorari in this case and hear oral argument or remand the case to the Court of Appeals for further consideration in light of *Keyes v. School District No. 1*, No. 71-507, decided June 21, 1973, for two significant reasons not heretofore presented:

First, petitioners were and are entitled to a consideration and determination by the Fifth Circuit of the issue squarely presented to that court by petitioners' brief—whether the record contained evidence of intent to discriminate—which the court expressly declined to consider in its haste to deliver a pre-*Keyes* decision for reasons hereafter discussed; and

Second, petitioners have never been afforded an opportunity for oral presentation or explanation of their position to either appellate court which has written on the matter.

A CRITICAL ISSUE WAS PRESENTED TO BUT NOT PASSED UPON BY THE FIFTH CIRCUIT

The simple but crucial question heretofore ignored by this Court may be simply stated: Would this Court have refused to either review the opinion of the Fifth Circuit or to remand for further consideration if the Fifth Circuit had expressly held that the record contained no evidence of intent to discriminate and had nonetheless affirmed the judgment of the trial court?

One of petitioners' main points in their appeal as a matter of right to the United States Court of Appeals for the Fifth Circuit was the proposition

that the record was devoid of evidence of segregative intent. The Court of Appeals refused to consider the point based on its mistaken view (as illuminated by the subsequent decision in *Keyes*) that intent to segregate is not a "necessary ingredient of constitutional violations in the field of education." (Appendix, p. 130).

In *Keyes* this Court said:

> "We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation to which we referred in *Swann* is *purpose* or *intent* to segregate."

What point was served in "emphasizing" the differentiating factor of intent or purpose if it was immaterial to the result? The statement was obviously not idle rhetoric. Much of this Court's decision in *Keyes* was entirely dependent on the distinction stated. The holding of the Fifth Circuit from which this petition emanates is in sharp contrast:

> "(The School District) urges, even if the imbalance could be traced to Board action, it does not fall within constitutional proscription because it has not acted with a discriminatory motive or purpose.

"We must also reject this type of continued meaningless use of de facto and de jure nomenclature to attempt to establish a kind of ethnic and racial separation of students in public schools that federal courts are powerless to remedy." (Appendix, p. 129).

* * *

"Discriminatory motive and purpose, while they may reinforce a finding of effective segregation, are not necessary ingredients of constitutional violations in the field of public education." (Appendix, p. 130).

* * *

"(The School Board) iterates that in the absence of a malevolent motive, de facto and not de jure segregation exists.

"While there is admittedly no catholicity of viewpoint in the Circuits on the question of intentional state action, this Court has never tempered its prohibition of school board actions that create, maintain, or foster segregation by the requirement that a discriminatory intent be shown." (Appendix, p. 132).

* * *

"The determination that no discriminatory purpose be shown (sic) *makes it unnecessary for us to consider whether the record reveals intentionally discriminatory Board action.*" (Appendix, p. 135, footnote 7; emphasis added).

The Fifth Circuit purported to recognize a third type of segregation, which is proscribed independent of and apart from the manner in which it came to be. The suggestion is one calculated to further confound the school districts throughout the country, or if the holding is not the law, then at least to visit a most unfortunate result on the Corpus Christi Independent School District:

"Thus, we discard the anodyne dichotomy of classical de facto and de jure segregation." (Appendix, p. 128).

* * *

"We therefore hold that the racial and ethnic segregation that exists in the Corpus Christi School system is unconstitutional —not de facto, not de jure, but unconstitutional." (Appendix p. 128).

The holding of the Court of Appeals is irreconcilable with this Court's disposition of the same issue in *Keyes*. If discriminatory purpose or intent is immaterial, as the Fifth Circuit has held, why

did this Court declare in *Keyes* that once it is established that there is intentional segregation in a segment of a school system "it is both fair and reasonable to require that the school authorities (in order to avoid district-wide desegregation requirements) bear the burden of showing that their actions as to other segregated schools within the system were not also motivated by segregative intent?"

If intent or purpose to segregate is not a necessary ingredient of unconstitutional segregation, what difference does it make whether the school authorities bear the burden which the Court has said they should? What purpose the language of this Court in *Keyes* that:

> "This is not to say, however, that the prima facie case may not be met by evidence supporting a finding that a lesser degree of segregated schooling in the core city area would not have resulted even if the Board had not acted as it did."
>
> * * *
>
> "Thus, if respondent School Board cannot disprove segregative intent, it can rebut the prima facie case only by showing that its past segregative acts did not create or contribute to the current segregated conditions of the core city schools."

Why rebut the prima facie case if, in the words of the Fifth Circuit, the segregation, though not "de jure" is nonetheless "unconstitutional"?

There is no legal tenet of which petitioners are aware that would entitle this Court to deny relief on the *assumption* that if the lower courts followed the declarations of this Court in *Keyes* and reviewed the record for evidence of intent, the result below would be the same. The trial judge leaned heavily on statistical information to arrive at his conclusion that there was "unconstitutional segregation." (Appendix, p. 17, footnote 36; p. 29). But his keystone conclusion was that "this segregated and dual school district" had its "real roots in the minds of men"—but not in intentionally or purposefully segregating. Absolutely not! On the contrary, it was in "the failure of the school system to anticipate and correct the imbalance that was developing". (Appendix, p. 31). Failure to anticipate and correct imbalance that is developing is a far cry from the intentional or purposeful creation of that imbalance in the first instance, as discussed in *Keyes*.

On more than one occasion this Court has remanded a matter to the Court of Appeals for a determination of issues not passed on by that court. *E.g. United States v. Ballard*, 322 U.S. 78, 64 S.Ct.

882, 88 L.Ed. 1148 (1944); *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210, 65 S. Ct. 235, 89 L.Ed. 187 (1944). Here the issue not passed upon by the Court of Appeals was whether there was evidence of intent or purpose to segregate. The 200,000 residents represented in this matter by the Corpus Christi Independent School District are entitled to an appellate determination — by this Court or by the Court of Appeals — as to whether the record contains evidence of intent or purpose to segregate. The question was properly preserved and petitioners will not have had their day in the appellate courts until the question has been squarely addressed and resolved.

PETITIONERS HAVE NOT BEEN BUT SHOULD BE PRESENTED AN OPPORTUNITY FOR ORAL PRESENTATION OF THE ISSUES ON APPEAL TO AT LEAST ONE APPELLATE COURT WHICH WRITES AN OPINION ON THE CASE.

At some point along the voyage of this case through the appellate channels, petitioners are entitled to an oral presentation of the issues and record evidence to the court which finally decides this case on the merits. Petitioners were never afforded such an opportunity for reasons which may have served the particular purpose of the Fifth Circuit but not of the litigants.

Oral presentation is especially important in this case, intimately involved as are the issues with the geography and growth of the City of Corpus Christi and the Corpus Christi Independent School District. The principal evidence consisted of large, ethnic distribution maps which graphically portrayed what petitioners cannot adequately describe or portray in written briefs but which are easy of presentation and understanding in oral argument. Oral presentation combined with use of the demonstrative evidence is the only means of effectively presenting the case. Such a presentation will establish two important points; first, the development of a high degree of segregation in residential areas at extreme ends of the District not caused by state action, and second, that construction of schools and student assignment as carried out by the School District was an intelligent approach to the geographic problems presented rather than the result of an intent to segregate.

Thus far, however, petitioners have not had their rightful day in the appellate courts. They have been shunted back and forth from the very beginning. The trial judge found in his partial final judgment at the conclusion of the first evidentiary hearing that there existed a basis for an interlocutory appeal to review major questions about which there was considerable doubt. (Appendix, pp. 51 - 52). The Fifth Circuit rejected the

attempted appeal. (Appendix p. 53). The trial judge thereupon ordered a desegregation plan into effect and a stay was granted. It was immediately vacated by the Fifth Circuit. (Appendix, p. 104). The action of the Fifth Circuit was only reversed by a petition to this Court. (Appendix, p. 104).

Petitioners then asked for an *en banc* hearing on the merits by the Fifth Circuit. The request was refused. (Appendix, p. 106). Accordingly, oral argument was to a three judge panel rather than to the fifteen justices who participated in the eventual, fragmented merits opinion. Petitioners were later advised that a decision on the merits would be withheld "pending a decision of the Supreme Court of the United States" — obviously *Keyes*. (Appendix, p. 117). Then, shortly before this court heard oral argument in *Keyes* and with no explanation of the two about-faces, the Fifth Circuit did write an *en banc* opinion and it wrote the opinion without awaiting the decision of the Supreme Court. Without regard to the confusion attendant to its precipitous and unannounced advent, the opinion did little by way of clearly explaining to petitioners exactly what their transgression had been. The majority opinion was written by only eight of the fifteen judges. Some joined or concurred in the first part of the opinion, some in the last, some in neither, and some still felt that the court should have done what it originally said it

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would do, await the opinion in *Keyes v. School District No. 1.*

It is difficult to infer that the Fifth Circuit's decisions to write *en banc* and before *Keyes* were conceived primarily to resolve the problems of the Corpus Christi Independent School District. Given the procedural background, reasonable minds could conclude that the fragmented Fifth Circuit was moved to render an advisory opinion to the Supreme Court of the United States. Judges are human and the Fifth Circuit has long sat in consideration of the difficult progeny spawned by *Brown I* while other circuits in the northern and western states where segregation has never been mandated by state law have comfortably but firmly held, time and again, that segregation flowing from other causes than intent to segregate results in no constitutional violation. It is little wonder then — but not necessarily dispensation of justice to petitioners — that when presented with this case, the only case ever to be considered by them which did not involve statutorily required segregation, and given the knowledge that this Court would write soon on the subject, the Fifth Circuit should seize upon Corpus Christi as an unwilling and unfortunate vehicle in which to carry its views to the Supreme Court.

It was not the ideal case for the Fifth Circuit's

purpose. The bases for the trial court's conclusions were hazy at best and in some cases completely contradictory. But it was the only available opportunity. And so, with a peremptory reversal of the original denial to hear the case *en banc* and an ill-advised abandonment of the original decision to await *Keyes*, the fragmented court made Corpus Christi its unwilling and unfortunate messenger, directed to carry to this Court the view of eight of fifteen judges of the Fifth Circuit that without regard to antecedent intent, this or any other school district should be required to "desegregate" not because there was *de jure* segregation, not because there was *de facto* segregation, but because there was "*unconstitutional*" segregation.

Even had it wanted to hang its merits-opinion-hat on the peg of segregative intent, the Fifth Circuit could not have done so, nor should this Court assume automatically that the Fifth Circuit would find segregative intent if the case is remanded as it should be. The trial judge's decision is replete with comments which reveal the mistaken view that segregation from whatever cause is "unconstitutional." Although he was supposed to be questing for evidence of discriminatory intent, he castigated the School District time and again for its failure to affirmatively integrate Mexican-Americans and Anglo-Americans. He found in the failure to act affirmatively in response to a violation

not yet found to exist, conduct which he concluded was unconstitutional — a prime example of circular reasoning. As petitioners have previously pointed out, there was no duty to act affirmatively until there was found to have been a constitutional violation. The trial court leaned most heavily on statistical evidence of segregation in fact. (Appendix, p. 17, footnote 36; p. 29). But his moment of truth lay in his observation that the "segregated and dual school district" had its "real roots in the minds of men". (Appendix, p. 31). Though this language might be suggestive of intent, he dispelled the possibility of such an inference by specifically identifying the process in "the minds of men" to which he referred as "failure of the school system to anticipate and correct the imbalance that *was developing*". (Appendix p. 31). Had there been evidence of intent to segregate as opposed to mere segregation in fact, it would have been a simple matter for the court to have so found. That he did not speaks volumes to the points petitioners here urge — that there was no evidence of intent to segregate, and that the Fifth Circuit should review the question presented to and side-stepped by them to petitioners' extreme detriment.

Confronted with such a holding, the Fifth Circuit had several alternatives. It could simply hold that absent intent there was no constitutional

violation. But this would not get that court's message to this Court. Accordingly, it refused to pass on the existence *vel non* of evidence of intent and discarded the requirement of intent entirely. By so doing it created a conflict with the decisions of Courts of Appeal for northern and western circuits. It acknowledged that fact (Appendix p. 132) and Corpus Christi became the pawn.

In this Court petitioners have once again been met with a divided refusal to consider their contentions on the basis of a full-scale review. Allusion has already been made to the proposition that oral argument here would clearly demonstrate the simple truth of the District's position: that given the growth, residential patterns, continuing population shifts, and the unique geography of the city, the School District had only two alternatives. It could either treat all of its children alike, assigning them impartially to neighborhood schools with whatever segregation was unintentionally attendant thereto, or it could proclaim its Anglo- and Mexican-American children different from one another and assign them to schools by gerrymandering boundaries (which would accomplish little intermixing in many areas), transporting them past closer schools to others more distant, or by adopting some other bizarre method of student assignment.

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Now this Court has decided that the District should not have the right to make an oral presentation which it was never afforded in the Court of Appeals and has concluded, five to four, that it should not have the right to a review of the evidence-of-intent issues presented to but not passed upon by either this Court or the Court of Appeals.

Petitioners sincerely believe that the law as announced by the Fifth Circuit below conflicts with this Court's language in *Keyes*. The conflict is one which is irreconcilable and unexplainable when examined in the light of the evidence upon which the Fifth Circuit refused to pass. It is the type of conflict which, in itself, has many times been held a valid basis for review here. *Egan v. City of Aurora*, 365 U.S. 514, 81 S.Ct. 684, 5 L.Ed.2d 741 (1961); *Pure Oil Co. v. Suarez*, 384 U.S. 202, 86 S.Ct. 1394, 16 L.Ed.2d 474 (1966). The oral argument which petitioners seek can and will reveal to the Court the error which has been committed.

It is doubtful that any other case of the import of this one to the 200,000 citizens of Corpus Christi has been disposed of by the federal appellate courts in like manner. Corpus Christi should not have been used as a veritable trial balloon. This Court should reconsider, grant the Petition for Writ of Certiorari, and either afford the oral

argument attendant thereto or remand the case to the Fifth Circuit for consideration in light of *Keyes v. School District No. 1* as many of the judges of both this Court and of the Court of Appeals felt should be done.

CONCLUSION

For the reasons set forth above, petitioners respectfully urge that this Petition for Rehearing be favorably ruled upon by this Court, and that their petition for Writ of Certiorari be granted, to be followed by oral argument before this Court or by a summary reversal and remand to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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RULE 58 CERTIFICATE AND CERTIFICATE OF SERVICE

I, Richard A. Hall, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for the purpose of delay, and that the Petition for Rehearing is restricted to substantial grounds available to petitioners although not previously presented.

I further certify that on July 19, 1973, three copies of the foregoing Petition for Rehearing were served upon each party of record by depositing each set of copies in a United States Post Office, with air mail postage prepaid, properly addressed to counsel of record as follows:

Mr. James P. Wolf, Dixie, Wolf & Hall, and Mr. James DeAnda, Attorneys for Respondents, 609 Fannin Street Building—Suite 401, Fannin Street at Texas Avenue, Houston, Texas 77002;

Hon. Elliot Richardson, Attorney General of the United States, United States Department of Justice, Washingon, D. C. 20530.

Hon. Erwin Griswold, Solicitor General of the United States, United States Department of Justice, Washingon, D. C. 20530.

Richard A. Hall